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No. 99-

IN THE

Supreme Court of the United States

PARSONS CORPORATION; PARSONS ENGINEERING SCIENCE, INC.; PARSONS ENVIRONMENTAL SERVICES, INC.; AND THE RALPH M. PARSONS COMPANY,

Petitioners,

v.

UNITED STATES OF AMERICA *ex rel.* JANET C. OLIVER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

i. Whether the *qui tam* provision of the False Claims Act, 31 U.S.C. § 3729, unconstitutionally extends federal court jurisdiction beyond Article III limits by permitting an action by a plaintiff who has not suffered a "particularized" injury and who therefore lacks standing under Article III, Section 2.

ii. Whether allowing a *qui tam* plaintiff standing to assert an injury to the United States is contrary to this Court's holding that only "officers of the United States" appointed pursuant to Article II, Section 2 may conduct civil litigation on behalf of the United States.

iii. Whether allowing a *qui tam* plaintiff standing to assert an injury to the United States violates constitutional separation of powers because it limits the President's ability to control the prosecutorial powers wielded by a *qui tam* plaintiff and thereby conflicts with the President's duty to "take Care that the Laws be faithfully executed."

iv. Whether a person can be liable for presenting a false claim under the False Claims Act, 31 U.S.C. § 3729, when that claim is based upon an admittedly reasonable interpretation of an ambiguous regulation or statute.

PARTIES TO THE PROCEEDINGS

Pursuant to Sup. Ct. R. 29.6, respondents submit the following corporate disclosure statement:

This brief is filed on behalf of all petitioners (referred to collectively herein as "Parsons"). Parsons Infrastructure & Technology Group Inc., formerly known as and erroneously sued herein as The Ralph M. Parsons Company, is a first-tier, wholly-owned subsidiary of Parsons Corporation. Prior to March 31, 1994, Parsons Environmental Services, Inc., was also a first-tier, wholly-owned subsidiary of Parsons Corporation. On March 31, 1994, Parsons Environmental Services, Inc., merged into Parsons Engineering Science, Inc., a first-tier, wholly-owned subsidiary of Parsons Infrastructure & Technology Group Inc.

Parsons Corporation has no parent company and no publicly held company owns 10% or more of the stock of Parsons Corporation. Parsons has a percentage of ownership in the following companies: (1) ASRC Parsons Engineering, LLC; (2) Architects & Engineers Ltd.; (3) Arroyo Seco Building Limited Partnership; (4) California Toll Road Company, L.P.; (5) California Toll Road Development Group, L.P.; (6) Consorcio Contrina LLC; (7) G*UB*MK; (8) GCR, Ltd.; (9) Hanmi Construction Technology Management Co., Ltd.; (10) INEPAR L.L.C.; (11) JPK Group, Ltd.; (12) Landmark Parsons LLC; (13) PC&G Company Incorporated; (14) Parmetek, S.A. De C.V.; (15) Parsons-UXB Joint Venture; (16) Parsons Group Oman Engineering LLC; (17) Proyeparsons, C.A.

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Petitioners Parsons Corporation; Parsons Engineering Science, Inc; Parsons Environmental Services, Inc; and The Ralph M. Parsons Company (collectively "Parsons") respectfully request this Court to issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit and to review that court's judgment reversing the district court's order granting summary judgment in favor of Parsons.

OPINIONS AND ORDERS BELOW

The July 19, 1999 opinion of the United States Court of Appeals for the Ninth Circuit is reported at *United States ex rel. Oliver v. Parsons*, 184 F.3d 1101 (9th Cir. 1999). The Court of Appeals' October 22, 1999 Amended Opinion, Order Amending Opinion, and Order Denying Rehearing and Rehearing En Banc is reported at 195 F.3d 457 (9th Cir. 1999). A true and correct copy of the amended opinion is included herein as Appendix A.

The district court's order is unreported. A true and correct copy is included herein as Appendix B.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Ninth Circuit issued its opinion on July 19, 1999. On August 2, 1999, Parsons timely petitioned for rehearing and suggested the appropriateness of rehearing en banc. On October 22, 1999, the Court of Appeals amended its opinion, denied Parsons' petition for rehearing, and rejected the suggestion of rehearing en banc.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) to review, by writ of certiorari, the Court of Appeals' October 22, 1999 amended opinion reversing the district court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article III, Section 2, Clause 1 of the Constitution provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to

all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States; — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Article II, Section 2, Clause 2 of the Constitution provides:

[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Article II, Section 3 of the Constitution provides:

[The President] shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall

> take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Title 31, U.S.C. § 3729, entitled "False claims," provides:

> (a) Liability for certain acts. — Any person who —
>
> (1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;
>
> . . .
>
> is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person. . . .

A true and correct copy of the full text of the statute and the statute's *qui tam* provision, 31 U.S.C. § 3730(b), are set out herein as Appendix C.

STATEMENT OF THE CASE

A fundamental issue petitioners raise is whether Congress can validly eliminate the Article III standing requirement that a plaintiff suffer a particularized injury so long as the plaintiff alleges an injury to the United States. In the context of this action, the issue is whether the *qui tam* provision of the False Claims Act is unconstitutional because it permits a plaintiff who does not assert an injury to herself to prosecute an action in federal court to vindicate an alleged injury to the United States.

Petitioner Parsons maintains that Congress may not constitutionally confer standing on a plaintiff who does not allege that she has herself suffered an injury as a result of the defendant's putatively illegal conduct. Parsons also contends that the Appointments Clause and separation of powers principles preclude a private party plaintiff from litigating in

the name of the United States when the government has declined to prosecute an action.[1]

Finally, review is proper to negate the Ninth Circuit's pernicious holding that a claim can be "false" within the meaning of the False Claims Act when it is based upon an objectively reasonable interpretation of an ambiguous regulation or statute. The Ninth Circuit erred in striking down the "reasonable compliance" analysis the District Court employed in determining whether a false claim existed. Strict construction of this quasi-criminal statute and proper application of the rule of lenity require that the False Claims Act be construed to preclude a finding that a defendant submitted a "false" claim when the finder of fact has determined that the defendant's claims are based on a reasonable interpretation of the statute or regulation at issue.

Jurisdiction of the District Court. Plaintiff predicated federal jurisdiction on 31 U.S.C. § 3732(a). Parsons contends, however, that the District Court was without jurisdiction of this action because the action is not a "Case" or "Controversy" within the meaning of Article III, Section 2. Accordingly, the Court of Appeals (and this Court) are without jurisdiction to do anything other than announce the fact that no jurisdiction exists and then to "dismiss[ ] the cause." *Ex parte McCardle*, 74 U.S. (7 Wall.)

1. This constellation of standing issues was not raised below. In its 1993 opinion in *United States ex rel. Kelly v. Boeing*, 9 F.3d 743 (9th Cir. 1993), the Ninth Circuit addressed the same constitutional challenges to the False Claims Act that petitioners raise here. The court in *Kelly* held that the *qui tam* provision of the False Claims Act was not constitutionally deficient. In doing so, the *Kelly* decision effectively foreclosed the opportunity to raise below the Article III standing and related issues petitioners now raise before this Court. Accordingly, it would have been futile for petitioners to raise these issues in the Court of Appeals. Because these issues address the constitutional jurisdiction of the federal courts, however, they may be raised at any stage of the proceedings. *See Clinton v. City of New York*, 524 U.S. 417, __, 118 S. Ct. 2091, 2098 (1998). In addition, given the uniformity of Court of Appeals decisions to date, it is unlikely that any future petition will encompass a Court of Appeals deliberation of the standing issues raised herein.

506, 514 (1868); *see also Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, __, 118 S. Ct. 1003, 1012 (1998).

This action. This is a private enforcement action under the *qui tam*[2] provision of the of the False Claims Act, 31 U.S.C. § 3729 *et seq.* The False Claims Act imposes liability on "[a]ny person" who "knowingly presents" a "false or fraudulent claim" to the United States Government "for payment or approval." 31 U.S.C. § 3729(a)(1). Such a person is liable to the government for treble damages plus a penalty of $5,000 to $10,000 per false claim. The *qui tam* provision of the False Claims Act, 31 U.S.C. § 3730(b), "authorizes private individuals, 'relators,' to bring claims on behalf of the United States against any person who knowingly presented false or fraudulent claims to the United States in violation of § 3729." *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 943 (1997).

Qui tam actions under the False Claims Act. A *qui tam* action under the False Claims Act may be initiated by any person who believes she knows of a fraud on the government. *Qui tam* plaintiffs are not appointed by a court or a member of the Executive Branch. Nor must they receive the Attorney General's permission to initiate an action in the name of the United States.

Once a *qui tam* action has been instituted, the United States is given an opportunity to intervene and take control of the action. The Act requires that the *qui tam* plaintiff's complaint be kept under seal, without service on the defendant, for at least 60 days, 31 U.S.C. §§ 3730(b)(2)-(3), and that the government be provided with a copy of the complaint and "written disclosure of substantially all material evidence and information the

2. "*Qui tam*" is an abbreviation for the Latin phrase "*qui tam pro domino rege quam pro si ipso in hac parte sequitur*," meaning "Who sues on behalf of the King as well as for himself." *Black's Law Dictionary* 1251 (6th ed. 1990). A *qui tam* action is an action "brought by an informer, under a statute which establishes a penalty for the commission or omission of a certain act . . . , part of the penalty to go to any person who brings such action and the remainder to the state or some other institution." *Id.*

[*qui tam* plaintiff] possesses," *id.* § 3730(b)(2), in order to permit the government to decide whether to intervene.

If the government intervenes, it takes control of the suit, *see, e.g., id.* § 3730(b)(4)(A) (stating that "the action shall be conducted by the Government"), and has "primary responsibility for prosecuting the action," *id.* § 3730(c)(1). If the United States declines to intervene, the *qui tam* plaintiff has "the right to conduct the action." *Id.* §§ 3730(b)(4)(B), 3730(c)(3).

A *qui tam* relator need not abide by the policies of the Justice Department or any other Department of the Executive Branch. In addition, a relator is not subject to removal by the President or the Attorney General. In fact, the relator's participation in the litigation may be limited only in certain circumstances, and even then, only by court order.

Any recovery in a *qui tam* action, whether or not the government intervenes, belongs to the United States. The *qui tam* relator is generally entitled to receive a share of the government's recovery. *See id.* §§ 3730(d)(1), (2). The *qui tam* relator's award is paid only from "the proceeds" of the suit. *Id.*

Oliver's complaint. On August 14, 1995, *qui tam* plaintiff Janet C. Oliver ("Oliver" or "Plaintiff") filed her complaint in this action under seal. App. B at 22a.[3] She notified the government and disclosed to the government all her evidence of Parsons' alleged fraud. App. B at 22a. On November 7, 1996, the government declined to intervene in the litigation. App. B at 22a. The complaint was then unsealed, and Oliver began pursuing the action on her own. App. B at 22a. In her complaint, plaintiff alleged that Parsons knowingly violated the federal Cost Accounting Standards in an effort to overcharge the government, thereby giving rise to a claim under the Act.

District Court Order. The parties filed a joint statement of stipulated facts on April 28, 1997. App. B at 22a. Both parties moved for summary judgment. App. B at 22a. On July 31, 1997, the district court entered summary judgment for Parsons. App. B at 22a. The district court found that Parsons "reasonably

3. Citations to "App. __" refer to the Appendix to this Petition.

complied with [all] applicable guidelines." App. B. at 28a & n.3. The district court held that Parsons did not file a "false" claim because it had based its accounting methods on an objectively reasonable interpretation of the relevant government accounting standards. App. B. at 28a. The district court also held that plaintiff failed to establish a genuine issue of material fact as to the False Claims Act's scienter requirement. App. B at 31a-32a. Oliver appealed.

Court of Appeals Opinion. On appeal, the Ninth Circuit reversed the district court by a published opinion and held that the district court erred by applying a "reasonable interpretation" approach when determining whether the claims submitted by Parsons were "false" within the meaning of the False Claims Act. App. A at 6a. The Court of Appeals further held that genuine issues of material fact existed as to whether Parsons "knowingly" submitted a false claim. App. A at 18a. Parsons petitioned for rehearing and suggested rehearing en banc. On October 22, 1999, the Court of Appeals amended its previous opinion, denied Parsons' petition for rehearing, and rejected the suggestion for rehearing en banc. App. A at 5a.

SUMMARY OF ARGUMENT

The *qui tam* provision of the False Claims Act purports to expand the federal judicial power beyond Article III limits by conferring a cause of action on a plaintiff who has not suffered a "particularized" injury and who therefore lacks standing to bring an action in federal court.

Plaintiff has not alleged that *she* has personally suffered an injury as a result of defendant's putatively illegal conduct. Indeed, her sole allegation is that *the government* has been injured as a result of Parsons' conduct. Plaintiff's only personal interest in this litigation is in obtaining a statutory "bounty" if she ultimately prevails against Parsons. Under this Court's well-established precedent, this type of interest is not a sufficient substitute for the "injury in fact" Article III requires. Plaintiff may not rely on an alleged injury *to the government* to support *her* standing.

To permit plaintiff to support her standing with the government's injury is also contrary to this Court's holding that only "Officers of the United States" appointed under Article II may enforce the law on behalf of the United States. Further, vesting plaintiff with full prosecutorial authority violates the separation of powers doctrine because it delegates and diffuses the executive branch's power to investigate and prosecute offenses against the United States. Congress' delegation of the Executive's power to prosecute offenses against the United States to a private plaintiff unconstitutionally abrogates the President's ability to "take Care that the laws be faithfully executed."[4]

Finally, the Court of Appeals also erred in construing the False Claims Act by holding that a defendant's reasonable interpretation of an ambiguous statute or regulation can be the basis for a "false" claim under the Act. In so holding, the Court of Appeals has ignored the rule of lenity and other maxims of statutory construction well-established by this Court. Moreover, the decision creates a conflict with the Fourth, Fifth, Seventh and Eighth Circuits, which have held that a reasonable interpretation of a contract, statute, or regulation precludes a finding of falsity. The Court of Appeal's holding also unsettles the law of government contracts — an area with a particular need for national uniformity.

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4. This *qui tam* case is paradigmatic. It presents an outstanding opportunity to reach the constitutionality of statutes purporting to create standing for bounty hunter plaintiffs. Defendants are significant federal government contractors. The plaintiff's only asserted injury is to the United States, and she alleges no separate claim of special injury to herself. In addition, the government has declined to intervene and prosecute the action.

This petition, moreover, squarely raises the Article II questions reserved in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, __ U.S. __, 2000 WL 16307 (Jan. 12, 2000) (Kennedy, J., concurring; Scalia, J., dissenting), regarding congressional creation of private citizens' standing to enforce public rights.

REASONS FOR GRANTING THE WRIT

1. THE *QUI TAM* PROVISION OF THE FALSE CLAIMS ACT IMPERMISSIBLY EXPANDS THE FEDERAL JUDICIAL POWER BY AUTHORIZING AN ACTION BY A PLAINTIFF WHO HAS NOT SUFFERED A "PARTICULARIZED" INJURY AND WHO THEREFORE CANNOT SATISFY ARTICLE III'S "CASE" OR "CONTROVERSY" REQUIREMENT

Article III confines the jurisdiction of the federal courts to actual "Cases" and "Controversies." *Clinton v. City of New York*, 524 U.S. 417, __, 118 S. Ct. 2091, 2099 (1998). "One element of the case-or-controversy requirement is that [plaintiff,] based on [her] complaint, must establish that [she has] standing to sue." *Raines v. Byrd*, 521 U.S. 811, 818 (1997); *see Allen v. Wright*, 468 U.S. 737, 750 (1984) (stating that the standing requirement "is perhaps the most important" of the doctrines that elaborate upon the "case or controversy" requirement).

"The term 'standing' subsumes a blend of constitutional requirements and prudential considerations." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982). At irreducible minimum, however, Article III requires a plaintiff to demonstrate: (1) that she has suffered an "injury in fact," an invasion of a legally protected interest that is concrete and particularized; (2) that there be a causal connection between the injury and conduct complained of; and (3) that it be likely that injury will be redressed by a favorable decision. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

a. A Plaintiff Does Not Suffer the Requisite "Particularized" Injury When the Government Is Injured but the Plaintiff Suffers No Direct Injury.

A plaintiff "must show, first and foremost, 'an invasion of a legally protected interest' that is 'concrete and particularized.' " *Arizonans for Official English v. Arizona*, 520 U.S. 43, 63 (1997) (quotations omitted). For injury to be "particularized," it "must

affect the plaintiff in a personal and individual way." *Lujan*, 504 U.S. at 560 n.1; *see also Sierra Club v. Morton* 405 U.S. 727, 734 (1972) (holding that the "injury in fact" test "requires that the party seeking review be himself among the injured"). Here, plaintiff alleges only one injury — that Parsons presented false claims to the United States in violation of 31 U.S.C. § 3729(a), and that these alleged claims were "*to the damage of the United States Government* in the sum of at least $2,950,853 trebled to $8,882,560." Complaint at 5, 6 (emphasis added). Under this Court's longstanding precedents, this asserted injury is insufficient for Article III standing purposes because "it does not constitute judicially cognizable injury" to the plaintiff herself. *Allen*, 468 U.S. at 752.

The only theoretical injuries *to plaintiff* are: (1) the injury plaintiff suffered as a citizen when Parsons allegedly perpetrated a fraud on the government; or (2) the injury plaintiff will suffer if she does not prevail and therefore receives no "bounty" for bringing an action on the government's behalf. The first formulation describes an injury *to the government*, and not *to the plaintiff*;[5] the second refers not to an injury to be redressed by the litigation, but rather describes a byproduct of the litigation. Under either formulation of injury — or both — plaintiff's action is not within the Article III jurisdiction of the federal courts. Any "injury" plaintiff has suffered is no more "particularized" to her than the injury all members of the public suffer when the government is defrauded and public monies

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5. Title 31, U.S.C. § 3730(h) provides a cause of action for

> [a]ny employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section.

Here, plaintiff has not alleged that she was retaliated against or that she otherwise *personally* suffered any harm as a result of her investigation or prosecution of this action.

are wasted. It is well-established that Article III standing may not be predicated on such an interest. *See Lujan*, 504 U.S. at 573-74 (holding that a plaintiff "seeking relief that no more directly and tangibly benefits him than it does the public at large . . . does not state an Article III case or controversy").[6]

Lujan is only one case in a long line of decisions holding that generalized injuries thinly and evenly spread across the citizenry are insufficient to establish Article III standing. *See, e.g., Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 220-21 (1974) (injuries "held in common by all members of the public" are insufficient to confer standing "because of the necessarily abstract nature of the injury all citizens share"); *Ex parte Levitt*, 302 U.S. 633, 634 (1937) ("a private individual" may invoke the judicial power only if "he has sustained or is immediately in danger of sustaining a direct injury as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public"); *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923) (plaintiff has no standing unless "he has sustained or is immediately in danger of sustaining some direct injury . . . , and not merely [when] he suffers in some indefinite way in common with people generally"); *Fairchild v. Hughes*, 258 U.S. 126, 129-130 (1922) (action was not a "case" within the meaning of Article III when plaintiff's asserted injury amounted to nothing more than every citizen's right "that the public moneys be not wasted").

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6. Moreover,

> although a suitor may derive great comfort and joy from the fact that the United States Treasury is not cheated, that a wrongdoer gets his just deserts, or that the nation's laws are faithfully enforced, that psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury.

Steel Co., 523 U.S. at __, 118 S. Ct. at 1019 (citations omitted).

b. A "Personal Stake" in the Outcome of an Action Is Not a Substitute for the Personal Injury Article III Requires

Lower federal courts upholding the constitutionality of the *qui tam* provision of the False Claims Act have ignored Article III's "injury in fact" requirement. *See, e.g., United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 749 (9th Cir. 1993); *United States ex rel. Kreindler & Kreindler v. United Techs. Corp.*, 985 F.2d 1148, 1154 (2d Cir. 1993). These courts have required only that a plaintiff show that she has a "personal stake in the outcome of the case," *Kelly*, 9 F.3d at 749, finding that a *qui tam* plaintiff has a sufficient "personal stake" in the outcome of the litigation because (1) the plaintiff must fund the prosecution of the action; (2) the plaintiff will receive a sizable bounty if she prevails in the action; and (3) the plaintiff may be liable for costs if the action is found frivolous. *See id.* These courts misread this Court's precedent.

A "personal stake" in the outcome of an action is not a substitute for the personal injury required by Article III. Indeed, a plaintiff must have a "personal stake" in her action to establish standing to maintain the action. *See Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 39 (1976) (holding that Article III requires that plaintiff "stand to profit in some personal interest"). But "profit" and "tangible benefit" are not alone enough to confer Article III standing. Article III requires a plaintiff to have suffered actual injury. *See Sierra Club*, 405 U.S. at 735 (requiring that "party seeking review be himself among the injured"). Here, plaintiff has suffered none.[7]

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7. In addition, serial error in upholding the False Claims Act's *qui tam* provisions on the grounds of historical validation does not render the statute constitutional. *See Marsh v. Chambers*, 463 U.S. 783, 790 (1983) ("Standing alone, historical practice cannot justify contemporary violations [of the Constitution.]"). When this Court has deferred to history to validate the constitutionality of a practice, the practice has been one that had become "part of the fabric of our society." *Id.* at 792. Proponents of the constitutionality of the *qui tam* statute have argued that the *qui tam* genus has existed in America since the First Congress.

(Cont'd)

Two terms ago, this Court held that a "litigation must give the plaintiff some other benefit besides reimbursement of costs that are a byproduct of the litigation itself." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, __, 118 S. Ct. 1003, 1019 (1998). Thus an interest in investigation and prosecution costs is insufficient to meet Article III's standing requirements even though recovery of costs "would assuredly benefit respondent as opposed to the citizenry at large." *Id.* ("Obviously, . . . a plaintiff cannot achieve standing to litigate a substantive issue by bringing suit for the cost of bringing suit."). The Court in *Steel Co.* also expressly rejected the argument that an interest in attorney's fees is sufficient under Article III. *See id.*; *Lewis v.*

(Cont'd)

In general, however, these early American "*qui tam*" statutes merely granted a reward to an informing citizen and did not permit the informer to sue on behalf of the United States when the exclusive injury asserted was to the government and not to the plaintiff. *See, e.g.*, Act of July 31, 1789, ch. 5, § 38, 1 Stat. 29, 48 (granting informers a reward but no right to sue on behalf of the government); Act of Aug. 4, 1790, ch. 35, § 55, 1 Stat. 145, 173 (permitting private actions to redress injuries suffered by private individuals, but not to redress injuries to the government alone). Rather, the use of *qui tam* provisions has been sporadic, owing to the numerous *qui tam* incarnations over the years. Unlike the appointment of paid chaplains to open legislative proceedings, the practice upheld in *Marsh*, the *qui tam* provision at issue here, last modified in 1986, has not had "the unambiguous and unbroken history of more than 200 years." *Id.*

Finally, the fact that the First Congress adopted some form of bounty hunter statutes, coupled with the notion that the First Congress is owed special constitutional deference, is unavailing. *See INS v. Chadha*, 462 U.S. 919, 982 n.18 (1983) (holding that use by First Congress of precursors to the legislative veto was unconstitutional); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (stating that "that an act of the legislature repugnant to the constitution is void" and holding section thirteen of the Judiciary Act of 1789 unconstitutional on the ground that even the First Congress cannot give the Supreme Court original jurisdiction where the constitution declares that jurisdiction shall be appellate).

Continental Bank Corp., 494 U.S. 472, 480 (1990) (holding that an "interest in attorney's fees is . . . insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim") (citations omitted).

A congressionally-created "bounty" or other statutory award is yet another "byproduct of the litigation itself." *Steel Co.*, 523 U.S. at __, 118 S. Ct. at 1019; *see* 31 U.S.C. §§ 3730(d)(1), (2). Like the recovery of costs and fees, a bounty that may or may not materialize is also insufficient to confer Article III standing. *See Valley Forge*, 454 U.S. at 486 (stating that anticipated consequence of proceedings "is not a permissible substitute for the showing of injury itself"); *Schlesinger*, 418 U.S. at 225 (rejecting the argument that standing should be recognized because "the adverse parties sharply conflicted in their interests and views and were supported by able briefs and arguments").

A bounty paid to a successful *qui tam* plaintiff from the proceeds of an action may in fact ensure self-interest on the part of the plaintiff. But "standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy." *Valley Forge*, 454 U.S. at 486. Rather, "[o]nly concrete injury presents the factual context within which a court, aided by parties who argue within the context, is capable of making decisions." *Schlesinger*, 418 U.S. at 221. It is only "*[t]his* personal stake" that "the Court has consistently held enables a complainant authoritatively to present to a court a *complete* perspective upon the adverse consequences flowing from the specific set of facts undergirding his grievance." *Id.* (emphasis added).[8] When the

8. *Sierra Club v. Morton*, 405 U.S. 727 (1972), and *Baker v. Carr*, 369 U.S. 186 (1962), do not hold otherwise. These cases both describe Article III as requiring that the plaintiff have "a personal stake in the outcome of the litigation." *Sierra Club*, 405 U.S. at 732; *Baker*, 369 U.S. at 204. But in neither case did this Court hold that a demonstrable "personal stake" may substitute for an injury in fact. Rather, under both *Sierra Club* and *Baker*, a plaintiff's "personal stake" must be a personal stake in vindicating an injury in fact. *See Sierra Club*, 405 U.S. at 734-

(Cont'd)

party invoking the court's jurisdiction has not suffered actual injury, the court's perspective on the dispute — particularly the resulting injury alleged — is critically incomplete.[9] This is all the more so where, as here, the party allegedly injured has expressly declined to participate.

In an unbroken line of cases, therefore, this Court has held that standing exists only when a plaintiff alleges particularized injury, for which neither the expense of bringing suit nor a bounty is a constitutionally permissible proxy. Because she has not suffered any particularized harm, plaintiff does not meet the Article III "injury in fact" requirement. She therefore lacks standing, and the federal courts lack jurisdiction of her action.[10]

2. PERMITTING A *QUI TAM* PLAINTIFF TO RELY ON AN ALLEGED INJURY TO THE GOVERNMENT TO SUPPORT HER STANDING WOULD VIOLATE THE APPOINTMENTS CLAUSE AND THE SEPARATION OF POWERS DOCTRINE

Lower federal courts addressing the standing issue in the context of the *qui tam* provision of the False Claims Act have also rejected Article III challenges to the statute on the ground that the *qui tam* plaintiff can assert *the government's* alleged injury even where the plaintiff has alleged no injury to herself.

(Cont'd)

35, 738 (stating that "the party seeking review must herself have suffered an injury"); *Baker*, 207-08 (noting that plaintiff alleged injury to "his right to a vote free of arbitrary impairment by state action," a right that "has been judicially recognized" as "secured by the Constitution").

9. Standing doctrine is marked by high principles, but it also grows out of pragmatic concerns relating to resource and allocation. *See People Organized for Welfare & Employment Rights v. Thompson*, 727 F.2d 167, 172 (7th Cir. 1984) (Posner, J.) ("If passionate commitment plus money for litigating were all that was necessary to open the doors of the federal courts, those courts, already overburdened with litigation of every description, might be overwhelmed.").

10. A contrary conclusion would allow Congress to legislate around the "irreducible minima" of Article III by including a bounty in any otherwise unconstitutional "citizen suit" provision.

See, e.g., *Kelly*, 9 F.3d at 747 (holding that "*qui tam* plaintiffs . . . may sue based upon an injury to the federal treasury"); *Kreindler & Kreindler*, 985 F.2d at 1154 (*qui tam* relators have standing to sue on the government's behalf even though they personally have not suffered actual or threatened injury); *United States ex rel. Milam v. University of Texas M.D. Anderson Cancer Ctr.*, 961 F.2d 46, 49 (4th Cir. 1992) ("The government, and not the relator, must have suffered the 'injury in fact' required for Article III standing."). These courts ignore this Court's precedent, however, which recognizes that allowing a plaintiff standing to assert the government's injury violates the Appointments Clause and the separation of powers doctrine.[11]

a. To Permit Plaintiff to Support Her Standing With the Government's Injury Runs Contrary To This Court's Holding That Only "Officers of the United States" Appointed Pursuant to Article II May Enforce the Law on Behalf of the United States

In *Buckley v. Valeo*, 424 U.S. 1, 140 (1976), this Court held that the function of "conducting civil litigation in the courts of the United States for vindicating public rights . . . may be discharged only by persons who are 'Officers of the United States.' " A *qui tam* plaintiff suing under the False Claims Act

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11. Neither can plaintiff's standing be validated under the doctrine of *jus tertii*, or "third party" standing. This Court has long recognized that, a "plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1975) (citations omitted). In certain, limited circumstances, this Court has permitted plaintiffs to assert an injury to a party not before the court, but the Court has always required the plaintiff himself to have suffered a concrete injury. *See, e.g. Georgia v. McCollum*, 505 U.S. 42, 55 (1992) (holding that "a litigant may raise a claim on behalf of a third party if the litigant can demonstrate that *he* has suffered a concrete injury, that he has a close relation to the third party, and that there exists some hindrance to the third party's ability to protect its own interests") (emphasis added) (citing *Powers v. Ohio*, 449 U.S. 400, 411 (1991)). As noted above, plaintiff here has suffered none.

is not appointed pursuant to the Appointments Clause, and therefore may not litigate on behalf of the United States.

i. *By Seeking to Permit a Private Plaintiff Standing to Assert the Government's Interest in Vindicating its Injury, Congress Has Impermissibly "Diffused" the Appointment Power*

The Ninth Circuit has resisted the plain language of *Buckley*, which states that "only officers of the United States may litigate on behalf of the government." *Kelly*, 9 F.3d at 758 ("We do not believe *Buckley* can fairly be read to state an unequivocal rule that only officers may exercise any prosecutorial authority in the name of the United States."). This holding is based on a misreading of *Buckley*.

In *Buckley*, this Court discussed what duties must be discharged by an officer appointed under the Appointments Clause. In doing so, it cited the *Confiscation Cases*, 74 U.S. (7 Wall.) 454, 458-59 (1869), *Springer v. Philippine Islands*, 277 U.S. 189, 202 (1928), and *Myers v. United States*, 272 U.S. 52, 175-76 (1926), for the respective propositions that (1) "all . . . suits" for the enforcement of the public law "so far as the interests of the United States are concerned, are subject to the direction, and within the control of, the Attorney-General"; (2) "the authority . . . to enforce [laws] or appoint the agents charged with the duty of such enforcement . . . are executive functions"; and (3) "the legislature cannot ingraft executive duties upon a legislative office, since that would be to usurp the power of appointment by indirection." As noted above, the Court in *Buckley* then held that the function of "conducting civil litigation in the courts of the United States for vindicating public rights . . . may be discharged only by persons who are 'Officers of the United States' within the language of [the Appointments Clause]." Because remedying a fraud on the government is the vindication of a public right, the False Claims Act's *qui tam* provision "usurp[s] the power of appointment by indirection." *Myers*, 272 U.S. at 275-76.

It is axiomatic that Congress may not "impermissibly undermine" Executive power by encroachments that have the effect of aggrandizing congressional power. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 856 (1986). This Court has also stated that the Appointments Clause was intended by the Framers to limit "diffusion" of the Executive's appointment power — even when such diffusion is not accompanied by aggrandizement of Congressional power. *Freytag v. Commissioner*, 501 U.S. 868, 884 (1991). By permitting a private person to "bring a civil action for a violation of [the False Claims Act] for the person and for the United States Government," 31 U.S.C. § 3730(b), Congress has unconstitutionally "diffused" the power of appointment by creating an office and then filling it by a "less accountable mode of appointment than the Constitution requires." *Weiss v. United States*, 510 U.S. 163, 188 n.3 (1994) (Souter, J., concurring). Put differently, Congress has delegated to any member of the public the power to appoint himself as plaintiff in name of the United States. Such a plaintiff is neither "accountable to political force" or "the will of the people," as is the Executive, the proper and sole holder of the power a *qui tam* plaintiff manages when, as here, the Executive has expressly opted not to prosecute.

ii. *The Appointments Clause States With Precision the Appointment Powers of the Three Branches and Gives Congress No Power to Appoint Any Officers*

"[T]he text of the Constitution describes with precision" the appointment powers of the three separate branches of our federal government. *Weiss*, 510 U.S. at 163 (Souter, J., concurring). "Principal" officers of the United States must be nominated by the President with advice and consent of the Senate. *See* U.S. Const. art. II § 2, cl. 2. "Inferior" officers may be appointed without Senate approval, but must be appointed either by "the President alone," by "the Courts of Law," or by "Heads of Departments." *Id.* No officer of the United States may be appointed by Congress alone.

As this Court has recognized, Congress may create "offices" and "provide such method of appointment to those 'offices' as it chooses," but unless the method of appointment selected by Congress "comports with [the Appointments Clause]," the holders of congressionally-created offices may "properly perform duties only in aid of those functions that Congress may carry out by itself, or in an area sufficiently removed from the administration and enforcement of the public law as to permit their being performed by persons not 'Officers of the United States.' " *Buckley*, 424 U.S. at 139. Conducting litigation in the court of the United States to vindicate public rights is an executive duty and function. *See id.* (recognizing that enforcement of the law and the appointment of agents " 'charged with the duty of such enforcement . . . are executive functions' ") (quoting *Springer v. Philippine Islands*, 277 U.S. 189, 202 (1928)). It is not a function "that Congress may carry out by itself," and is obviously not "in an area sufficiently removed from the administration and enforcement of the public law." Accordingly, Congress cannot, consistent with the Constitution, create a *qui tam* plaintiff who carries out an executive function where the method of selecting the *qui tam* plaintiff does not comport with the Appointments Clause. *See Buckley*, 424 U.S. at 140 (holding that persons who are not "Officers of the United States" appointed pursuant to Article II may not discharge functions that are properly discharged only by "officers").

b. To Permit Plaintiff to Support Her Standing with the Government's Injury Sanctions a Congressional Delegation of the Executive Branch's Power to Investigate and Prosecute Offenses Against the United States and Violates Separation of Powers Because it Conflicts With the President's Duty to "Take Care That the Laws Be Faithfully Executed"

"Time and again [this Court has] reaffirmed the importance in our constitutional scheme of the separation of governmental powers into the three coordinate branches." *Morrison v. Olson*, 487 U.S. 654, 693 (1988); *see Humphrey's Executor v. United*

States, 295 U.S. 602, 629 (1935) ("The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question.").

The separation of powers doctrine can be violated by either "provisions of law that either accrete to a single Branch powers more appropriately diffused among separate Branches" or provisions of law "that undermine the authority and independence of one or another coordinate Branch." *Mistretta v. United States*, 488 U.S. 361, 382 (1989). The *qui tam* provision of the False Claims Act violates the separation of powers doctrine because it "undermine[s] the authority" of the Executive Branch, *id.*, and prevents the President from fulfilling his duty to "take Care that the Laws be faithfully executed." U.S. Const. art. II § 3. When it is asserted that an act of Congress violates separation of powers by undermining the role of the Executive Branch, the crucial inquiry is whether the challenged act "disrupts the proper balance between the coordinate branches [by] prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions." *Morrison*, 487 U.S. at 693 (citing *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 443 (1977)).

In *Morrison*, this Court was presented with the question whether the Ethics in Government Act's provision for the appointment of an independent counsel prevented the President from fulfilling his duty to "take Care that the Laws be faithfully executed." This Court answered in the negative, and held that the Ethics in Government Act gave "the Executive Branch sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties." 487 U.S. at 696. But the *qui tam* provision of the False Claims Act differs from the independent counsel provision of the Ethics in Government Act in several constitutionally meaningful ways. Ultimately, the False Claims Act does not vest the Executive Branch with sufficient control over the *qui*

tam plaintiff. Consequently, it leaves the President unable to fulfill his duty to "take Care that the Laws be faithfully executed." U.S. Const. art. II § 3.[12]

i. ***Unlike the Ethics in Government Act at Issue in Morrison, the Attorney General Cannot Prevent the Initiation of an Action Under the False Claims Act***

The Court in *Morrison* recognized that

> [n]o independent counsel may be appointed without a specific request by the Attorney General, and the Attorney General's decision not to request appointment if he finds "no reasonable grounds to believe that further investigation is warranted" is committed to his unreviewable discretion. The [Ethics in Government Act] thus gives the Executive Branch a degree of control over the power to initiate an investigation by the independent counsel.

487 U.S. at 696.

Under the False Claims Act, no member of the Executive Branch has any power to decide whether an action is instituted. Any person may appoint himself as *qui tam* plaintiff and may institute an action in the name of the United States without seeking any prior approval. The False Claims Act then requires the Justice Department to investigate the relator's allegations,

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12. The Ninth Circuit has validated relator standing on the theory that "the [False Claims Act] effectively assigns the government's claims to *qui tam* plaintiffs." *See, e.g., Kelly*, 9 F.3d at 748. The purported assignment does not comport with basic principles of contract law, however, which require that the assignor (here the government) relinquish its interest in what is assigned. *See Restatement (Second) of Contracts* § 317(1) (1980). Under the False Claims Act, the government retains an interest in the ultimate recovery, if any, in the lawsuit. More importantly, the assignment argument fails simply because Article II, Section 3 vests the right to prosecute with the Executive Branch. The right to prosecute, therefore, is not Congress' to assign. Thus the "assignment" theory, even if valid as a matter of contract, violates the principle of separation of powers. *Cf. Bowsher v. Synar*, 478 U.S. 714, 726 (1986) ("The structure of the Constitution does not permit Congress to execute the laws; it follows that Congress cannot grant to an officer under its control what it does not possess.").

thereby compelling an allocation of resources notwithstanding the Department's other goals or priorities. *See* 31 U.S.C. § 3730(a) ("The Attorney General diligently shall investigate a violation under section 3729."). Moreover, when a *qui tam* plaintiff prosecutes without the government's intervention — perhaps because the Attorney General has deemed the suit meritless or unworthy of pursuing on grounds uniquely applicable to an elected and accountable branch — Executive Branch discretion is effectively reversed and nullified.

ii. *Unlike the Ethics in Government Act at Issue in Morrison, the False Claims Act Gives the Attorney General No Power to Remove a Qui Tam Plaintiff*

The Court in *Morrison* also recognized that the Ethics in Government Act gave "the Attorney General several means of supervising or controlling the prosecutorial powers that may be wielded by an independent counsel." 487 U.S. at 696. The Court stated that "[m]ost importantly, the Attorney General retains the power to remove the counsel for 'good cause,' a power . . . [which] provides the Executive with substantial ability to ensure that the laws are 'faithfully executed' by an independent counsel." *Id.*; *Humphrey's Executor*, 295 U.S. at 627 (stating that "units in the executive department" must be "inherently subject to the exclusive and illimitable power of removal by the Chief Executive," to whom they are a subordinate and aid); *Myers*, 272 U.S. at 134 (The moment that [the President] loses confidence in the intelligence, ability, judgment, or loyalty of any one of [his subordinates], he must have the power to remove him without delay."); *cf. Bowsher*, 478 U.S. at 730-32 (holding that office of Comptroller General "may not be entrusted with executive powers" because officer was subject to removal by Congress, and not by the President).

The False Claims Act's *qui tam* provision contains no such removal provision. Neither the President nor any member of the Executive Branch has any power to remove the plaintiff at any point in the litigation. If the Justice Department initially declines to intervene in an action brought under the False Claims Act — as it has here — it may later re-enter upon a showing of "good cause" but must not "limit the status and rights" of the relator. 31 U.S.C.

§ 3730(c)(3). Even then, the government can only limit the relator's participation in the case by demonstrating to the court that unrestricted participation by the relator would "interfere with or unduly delay the government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment." *Id.* § 3730(c)(2)(C).[13]

iii. *Unlike the Independent Counsel at Issue in Morrison, a Qui Tam Plaintiff Under the False Claims Act Need Not Follow Department of Justice Policy*

Finally, the Court in *Morrison* acknowledged that the Ethics in Government Act "requires that the [independent] counsel abide by Justice Department policy." The False Claims Act has no such requirement. Unlike the Ethics in Government Act's independent counsel, an False Claims Act *qui tam* plaintiff is primarily interested in her personal financial gain and is not bound by a prosecutor's ethical responsibility not to institute or continue baseless lawsuits. *Cf. Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 808 (1987) ("A prosecutor may be tempted to bring a tenuously supported prosecution if such a course promises financial or legal rewards.").

The False Claims Act effectively elevates a witness — the relator — to an untenable hybrid status within the litigation: witness/prosecutor. Like a prosecutor, a *qui tam* plaintiff "exercises considerable discretion in matters such as the determination of which persons should be targets of investigation, . . . what information will be sought as evidence, . . . [and] which persons should be utilized as witnesses," and

13. Such scenarios are "constitutionally bizarre" when examined against the backdrop of this Court's separation of powers jurisprudence. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, __ U.S. __, 2000 WL 16307 (Jan. 12, 2000) (Scalia, J., dissenting). Validation of the *qui tam* provision of the False Claims Act is acceptance of the proposition that Congress may delegate to the general public the prosecutorial powers and duties of the Executive, and may then require the Executive to seek permission of yet a third branch of government (the Judiciary) to intervene for the purpose of curtailing a private plaintiff's abuse of that power.

when and whether to settle an action. *Id.* But the False Claims Act's framework provides no Executive Branch check on the use or abuse of this power. *Id.* (" '[A] scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the[se] prosecutorial decision[s].' ") (quoting *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249-250 (1980)).

Accordingly, the False Claims Act leaves the Executive Branch without sufficient control under *Morrison*, and thus prevents the President from fulfilling his most fundamental duty as the Chief Executive, to "take Care that the Laws be faithfully executed." U.S. Const. art. II § 3.

3. THE COURT OF APPEALS ERRONEOUSLY HELD THAT A CONTRACTOR'S REASONABLE INTERPRETATION OF A STATUTE OR REGULATION IS NOT A BASIS FOR DETERMINING WHETHER A CLAIM IS "FALSE" UNDER THE FALSE CLAIMS ACT

The district court granted summary judgment in favor of Parsons and held that the subcontract accounting "reasonably complied" with the applicable government cost accounting guidelines. App. B at 28a & n.3. The Court of Appeals reversed and specifically rejected the District Court's analysis, holding that a defendant's reasonable interpretation of a statute or regulation was irrelevant to the determination whether a claim was "false" within the meaning of the False Claims Act. App. A at 6a, 12a-13a ("We hold that the district court erred in applying a 'reasonable interpretation' approach to determining falsity under the Act. . . ."). The Court of Appeals' holding essentially eliminates from the False Claims Act the requirement that a plaintiff prove that a defendant has submitted a claim that is, in fact, false, and it does so without regard to well-established rules of statutory construction. In addition, the Court of Appeals' holding conflicts with a long line of decisions of this Court and of other circuits. Finally, the Court of Appeals' holding greatly unsettles well-established principles of federal government

contract law — an area of law in which there is a strong need for national uniformity.

a. The Ninth Circuit Incorrectly Precluded the Issue of Reasonable Compliance in the Determination of Falsity

Because the False Claims Act is, at heart, a criminal statute, it must be narrowly construed. *See United States v. Bornstein*, 423 U.S. 303, 313 n.8 (1976) (stating that " 'we are actually construing the provisions of a criminal statute' ") (quoting *United States v. McNinch*, 356 U.S. 595, 598 (1958)).[14] "A prima facie Cost Accounting Standards [claim] under the [False Claims] Act . . . requires proof that: (1) the defendant made a claim against the United States; (2) the claim was false or fraudulent; and (3) that the defendant knew the claim was false or fraudulent." *United States ex rel. Oliver v. Parsons*, 195 F.3d 457, 461 (9th Cir. 1999) (citing 31 U.S.C. § 3729(a)(1)).[15] By holding that a district court may not consider a contractor's reasonable compliance with applicable statutes or regulations when determining whether a plaintiff has established a prima facie claim under the Cost Accounting Standards, the Court of Appeals has written out of the False Claims Act the requirement that a plaintiff prove that a claim is in fact "false or fraudulent."

The Court of Appeals recognized that the District Court found that Parsons' "accounting system reasonably complied with applicable rules and regulations." App. A at 11a. The Court of Appeals did not take issue with this finding. The Court of Appeals nonetheless held that the District Court erred because it referred to "reasonableness" when determining whether

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14. In *McNinch* and again in *Bornstein*, this Court recognized that " '[s]uch provisions must be carefully restricted, not only to their literal terms but to the evident purpose of Congress in using those terms, particularly where they are broad and susceptible to numerous definitions.' " *Bornstein*, 423 U.S. at 313 n.8 (quoting *McNinch*, 356 U.S. at 598).

15. The False Claims Act does not define the terms "falsity" and "fraudulent." *See Lamers v. City of Green Bay*, 268 F.3d 1013, 1018 (7th Cir. 1999).

plaintiff established a genuine issue of material fact on the issue of falsity:

> Thus, while the reasonableness of Parsons' interpretation of the applicable accounting standards may be relevant to whether it knowingly submitted a false claim, the question of "falsity" itself is determined by whether Parsons' representations were accurate in light of applicable law. Because the district court erroneously relied on this reasonableness analysis, we do not reach the issue of whether Parsons' accounting measures complied with the Cost Accounting Standard and instead remand for further proceedings on this issue.

App. A at 12a-13a.

The Ninth Circuit's apparent concern with the District Court's analysis is that a defendant

> could submit a claim, knowing it is false or at least with reckless disregard as to falsity, thus meeting the intent element, but nevertheless avoid liability by successfully arguing that its claim reflected a "reasonable interpretation" of the requirements.

App. A at 12a n.3. The Ninth Circuit is positing, therefore, that a claim could be both based upon a reasonable interpretation and false, and that a claim based upon a reasonable interpretation could nevertheless occasion the False Claims Act's punitive, quasi-criminal sanctions.

The Court of Appeals' holding to the contrary disregards well-established rules for the construction of criminal or quasi-criminal statutes. *See, e.g., United States v. Lanier*, 520 U.S. 259, 265 (1997) (stating that under "the canon of strict construction of criminal statutes, or rule of lenity," liability extends "only to conduct clearly covered"); *Crandon v. United States*, 494 U.S. 152, 168 (1990) (applying lenity in interpreting a criminal statute invoked in a civil action).

As applied to actions under the False Claims Act, the rule of lenity requires that statutory provisions "must be carefully restricted, not only to their literal terms but to the evident purposes of Congress in using those terms, particularly where they were susceptible to numerous definitions." *McNinch*, 356 U.S. at 598 (citations omitted).

A reasonable interpretation of a statute or regulation is not incorrect. Congress has the burden of clearly expressing the conduct it intends to proscribe. *See Connally v. General Constr. Co.*, 269 U.S. 385, 391-93 (1926). Conduct based on a reasonable interpretation of statute or regulation is not false. The hypothetical "bad man" posited in the Ninth Circuit's opinion as its concern is precluded by reference to "reasonableness." Conduct outside the reasonable penumbra of a statute or regulation will, by definition, not be reasonable. To preclude a district court from deciding "reasonable compliance" in essence vitiates the False Claims Act's requirement that a claim be false.

b. The Holding of the Court of Appeals Conflicts With the Rule in Other Circuits That Reasonable Interpretation of a Contract, Statute or Regulation Precludes Falsity as a Matter of Law

The Fourth, Fifth, Seventh, Eighth, and, hitherto, the Ninth Circuits, have all adopted the rule that a finding of objective reasonableness precludes a finding of falsity as a matter of law. *See, e.g., United States ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013, 1018 (7th Cir. 1999) ("[I]mprecise statements or difference in interpretation flowing out of a disputed legal question are similarly not false under the [False Claims Act]."); *United States ex rel. Hagood v. Sonoma County Water Agency*, 81 F.3d 1465, 1477 (9th Cir. 1996); *United States ex rel. Weinberger v. Equifax, Inc.*, 557 F.2d 456, 461, 463 (5th Cir. 1977); *see also, e.g., United States v. Race*, 632 F.2d 1114, 1120 (4th Cir. 1980) (False Statements Act); *United States v.*

Anderson, 579 F.2d 455, 460 (8th Cir. 1978) (same).[16] The Ninth Circuit's decision here conflicts; review by this Court is required to bring the Ninth Circuit in line with the proper construction rendered by the other circuits which have decided this issue.

c. The Decision of the Court of Appeals Greatly Unsettles the Law of Government Contracts–an Area with a Particular Need for National Uniformity of the Law

Left to stand, the decision below will lead to an exponential increase in litigation. By rejecting the reasonable interpretation "safe harbor," the Ninth Circuit forces every government contractor into a *Catch-22*. Instead of adopting a reasonable interpretation and proceeding when faced with an ambiguous regulation or contract term, the contractor must either (1) stop performance on the contract until it receives judicial construction of the contract, statute, or regulation, or (2) continue performance and risk that its reasonable interpretation will be found false within the meaning of the False Claims Act, subjecting it to significant "per occurrence" penalties and treble damages; when significant questions of interpretation arise, a careful contractor will either have to initiate a declaratory judgment action against the government or simply take its chances. The latter option will enable any employee or former

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16. Courts frequently refer to interpretations of analogous criminal statutes to interpret the False Claims Act. *See, e.g., Weinberger*, 557 F.2d at 460. In particular, courts frequently look to the parallel language of the False Statements Act, 18 U.S.C. § 1001, to interpret the False Claims Act. *See, e.g., Luckey v. Baxter Health Care*, 2 F. Supp. 2d 1034, 1048-50 & n.9 (N.D. Ill. 1998).

The Fourth and Eighth Circuits have held, in the context of the False Statements Act, that a statement cannot be false as a matter of law if, under any objectively reasonable interpretation, the allegedly false statement could be true. *See United States v. Race*, 632 F.2d 1114, 1120 (4th Cir. 1980); *United States v. Anderson*, 579 F.2d 455, 460 (8th Cir. 1978). The plaintiff bears the burden of negating any reasonable interpretation offered by the defendant that would make the defendant's statement factually correct. *See Race*, 632 F.2d at 1120; *Anderson*, 579 F.2d at 460.

employee who ever heard of the interpretation issue to file a *qui tam* action and take a chance at winning millions.[17]

The False Claims Act should not be the mechanism for resolving all contractual or regulatory disputes. Its purpose is to punish those who knowingly defraud the United States. To that end, Congress has specifically required that the United States prove both objective unreasonableness (falsity) and subjective intent to defraud (scienter) before imposing liability under the False Claims Act, including liability for treble damages, penalties, and attorneys' fees and costs. The Court of Appeals' decision mutates Congress' purpose in enacting the False Claims Act, and turns it impermissibly into a quasi-criminal remedy for every potential contractual or administrative dispute.

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17. In addition, the present inter-circuit split as to the interpretation of the False Claims Act will encourage plaintiffs to forum shop, based upon such differences in interpretation, among the several districts in which they may obtain jurisdiction and lie venue. To avoid falling prey to such practices, a nationally-established government contractor will be forced to conform his conduct to the law of the circuit with the strictest interpretation of the False Claims Act. *Cf. United States v. Qualls*, 172 F.3d 1136, 1140 (9th Cir. 1999) (en banc) (Hawkins, J., concurring in part and dissenting in part) (recognizing that such circumstances require that "a citizen look not to the established law of the circuit in which he resides, but to the law of the circuit taking the most expansive view of conduct prohibited by a statute, to determine what conduct he may undertake without risk of criminal prosecution until that point in time when the Supreme Court resolves any interpretative disagreement among the circuits").

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER DENYING PETITION FOR REHEARING AND AMENDED OPINION DATED AND FILED JULY 19, 1999 AND AMENDED OCTOBER 22, 1999

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 97-56452

D.C. No. CV-95-05423-WMB

UNITED STATES OF AMERICA, ex rel. JANET C. OLIVER,

Plaintiff-Appellant,

v.

THE PARSONS COMPANY; PARSONS ENGINEERING SCIENCE, INC.; PARSONS ENVIRONMENTAL SERVICES, INC.; RALPH M. PARSONS COMPANY,

Defendants-Appellees.

ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Central District of California
William Matthew Byrne, Jr., District Judge, Presiding

Argued and Submitted
June 10, 1999 — Pasadena, California

Appendix A

Filed July 19, 1999
Amended October 22, 1999

Before: Dorothy W. Nelson, Stephen Reinhardt, and Stephen S. Trott, Circuit Judges.

Opinion by Judge Trott

* * *

ORDER

The opinion filed July 19, 1999, is hereby amended as follows:

At slip opinion 8102, at the end of the sentence that begins, "Their meaning is ultimately the subject of judicial interpretation," add the following as footnote 2:

> We note that the agency to which the allegedly false claim was submitted has not taken any position regarding any of the issues in this case, and thus no question of *Chevron* deference is presented.

At slip opinion page 8103, add the following section at the end of section III. A. 3. as subsection 4:

4.

In a petition for rehearing, Parsons argues that our decision breaks from previous authority in this circuit on

the issue of whether a reasonable interpretation precludes falsity, citing *United States ex rel. Lindenthal v. General Dynamics Corp.*, 61 F.3d 1402 (9th Cir. 1995) and *United States ex rel. Hochman v. Nackman*, 145 F.3d 1069 (9th Cir. 1998). These cases are inapposite. *Lindenthal* did not involve the interpretation of a federal regulation but instead involved the interpretation of a contract between General Dynamics and the federal government. *Id.* at 1411. Because a term of the contract was held to be ambiguous, the court held that the parties' intent was relevant extrinsic evidence, and the court then used that evidence to inform the court's interpretation of the contract. "We agree that extrinsic evidence was properly admitted to flesh out the meaning [the contract]. 'Where contractual language is unclear and suggests several speculative interpretations, the scope of the language must be read in accordance with the parties' contemporaneous construction, and extrinsic evidence is admissible to show what the parties intended it to mean.' " *Id.* at 1411, (quoting *Lockheed Aircraft Corp. v. United States*, 553 F.2d 69, 89 (Ct. Cl. 1977)). This holding is applicable only in the realm of contract law, where a contract represents a "meeting of the minds" between the parties and where the parties' interpretation and performance of the contract may be relevant evidence of the contract itself.

Hochman is similarly unhelpful. 145 F.3d 1069. Parsons argues that *Hochman* stands for the proposition that a reasonable interpretation of an "imprecise" directive precludes falsity. *Hochman* involved allegations that a Veterans Administration clinic submitted false claims regarding the number of hours worked by physicians at the Clinic pursuant to an agreement between the clinic and the

University of Southern California School of Medicine. Contrary to Parsons' suggestion, the court did not hold that the Clinic's submission was not "false." To the contrary, the court explicitly declined to decide the question of falsity, and instead disposed of the case on the scienter element, holding that "[e]ven if the defendants erred in their interpretation of the Affiliation Agreement, the undisputed evidence demonstrates that the defendants believed that the Affiliation Agreement authorized their conduct." *Id.* at 1075.

Parsons also argues in its petition for rehearing that our holding splits from the Fifth and Seventh Circuits, asserting that those courts have adopted a "reasonable interpretation" approach to falsity. However, the cases cited do not support a conclusion that other courts have taken this view of "falsity." *United States ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013, 1018 (7th Cir. 1999) did not reach the issue and instead combined the issues of falsity and scienter, "our consideration of the falsity question will be incorporated into our knowledge discussion." *United States ex rel. Weinberger v. Equifax, Inc.*, 557 F.2d 456 (5th Cir. 1977) also did not address the question of reasonable interpretation and instead looked to legislative history in order to determine the appropriate statutory interpretation. Finally, in *Luckey v. Baxter Healthcare Corp.*, 2 F. Supp. 2d 1034, 1047 (N.D. Ill. 1998), aff'd, 1999 WL 482670 (7th Cir. July 12, 1999), the court held that the exercise of legitimate scientific judgment did not allow a finding of falsity. "Courts have consistently declined to find that a contractor's exercise of scientific or professional judgment as to an applicable standard of care falls within the scope of the FCA." *Id.*

In short, Parsons' petition arguing that the sky will fall upon government contractors if they are precluded from relying on a "reasonable interpretation" is not only unsupported by case law, it is also ungrounded in reality. It ignores the fact that the FCA requires more than just a false statement — it requires that the defendant *knew* the claim was false. 31 U.S.C. § 3729(a)(1). A contractor relying on a good faith interpretation of a regulation is not subject to liability, not because his or her interpretation was correct or "reasonable" but because the good faith nature of his or her action forecloses the possibility that the scienter requirement is met.

With these amendments, the panel has voted to deny the petition for rehearing and Judges Reinhardt and Trott have voted to deny the suggestion for rehearing en banc. Judge D.W. Nelson so recommends. The petition for rehearing and the petition for rehearing en banc are hereby DENIED.

OPINION

TROTT, Circuit Judge:

Janet C. Oliver, plaintiff qui tam, appeals the district court's denial of her motion for summary judgment and its grant of summary judgment in favor of defendants The Parsons Company, Parsons Engineering Science, Inc., Parsons Environmental Services, Inc., and Ralph M. Parsons Company (collectively, "Parsons"). The district court held that Parsons' cost accounting practices did not give rise to a claim under the False Claims Act, 31 U.S.C. § 3729 (West 1999) ("the Act") because Parsons employed a "reasonable

interpretation" of the applicable regulations and because the facts alleged failed to meet the scienter requirement.

This court has jurisdiction under 28 U.S.C. § 1291. We hold that the district court erred in applying a "reasonable interpretation" approach to determining falsity under the Act and that genuine issues of material fact exist regarding whether Parsons "knowingly" submitted a false claim. We therefore REVERSE and REMAND for further proceedings in accordance with this opinion.

I

FACTS

Oliver was an accountant for The Parsons Company ("TPC"). She now sues on behalf of the United States, claiming that Parsons knowingly violated the federal Cost Accounting Standards in an effort to overcharge the government, thereby giving rise to a claim under the Act.

Parsons Engineering Science, Inc. ("Parsons ES") is the predecessor of Engineering Science, Inc. ("ES") and is a subsidiary of TPC. Parsons ES is a significant federal government contractor, with contracts amounting to over $300 million between 1989 and 1996.

In August 1989, Parsons ES was awarded a $58,115,836 contract by the State of California Bureau of Automotive Repairs to operate part of the state's air quality emissions program ("the BAR contract"). In January 1990, Parsons ES awarded a subcontract to Inspection and Maintenance

Corporation ("I&M"), another wholly-owned subsidiary of TPC, to perform the "field and supervisory work" associated with the BAR contract. I&M's only corporate objective is the BAR contract; it performs no work for the federal government and has continued to perform under the BAR contract even after the written subcontract with Parsons ES expired on December 31, 1991.

I&M consists solely of employees who directly implement the BAR contract. It is, as the district court put it, "in essence, only a payroll." For accounting purposes, I&M labor costs were not included in Parsons ES's direct labor base cost but were instead characterized as "other direct costs" arising from the subcontract. This practice affects the overhead rate charged to the federal government by Parsons ES in its federal contracts because the overhead rate is calculated as a percentage of the difference between the direct labor base and the "overhead pool costs." For example, if Parsons ES's direct labor base cost is $100 and the overhead pool money amounted to $150, the overhead rate is 150%. If its direct labor base cost was increased to $150, then the overhead rate charged to the government is 100%. In this way, Oliver alleges that Parsons ES used I&M to reduce its direct labor costs, thereby increasing the overhead rate billed to the federal government.

Oliver filed this qui tam action under seal on August 14, 1995, notified the government, and disclosed to the government all her evidence of fraud. On November 7, 1996, the government issued a letter declining to intervene in the litigation. The complaint was then unsealed, and Oliver began pursuing the action as relator. The parties filed a joint

statement of stipulated facts on June 2, 1997. Both parties moved for summary judgment. On July 31, 1997, the district court entered summary judgment for Parsons, and Oliver now appeals.

II

STANDARD OF REVIEW

A grant of summary judgment is reviewed de novo. *Margolis v. Ryan*, 140 F.3d 850, 852 (9th Cir. 1998). We must determine, viewing the evidence in the light most favorable to the non-moving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Id.* The court must not weigh the evidence or determine the truth of the matter but only determine whether there is a genuine issue for trial. *Abdul-Jabbar v. General Motors Corp.*, 85 F.3d 407, 410 (9th Cir. 1996).

III

FALSE CLAIMS ACT

The Act prohibits any person from knowingly presenting a false or fraudulent claim for payment or approval by the federal government. 31 U.S.C. § 3729(a)(1) (West 1999). A prima facie Cost Accounting Standards under the Act therefore requires proof that: (1) the defendant made a claim against the United States; (2) the claim was false or fraudulent; and (3) that the defendant knew the claim was false or fraudulent. *Id.*; *see also Blusal Meats, Inc. v. United*

States, 638 F. Supp. 824, 827 (S.D.N.Y. 1986). The parties agree that Parsons made a claim against the United States. We therefore limit our review to the issues of falsity and knowledge.

A

False or Fraudulent Nature of the Claim

Oliver argues that the district court erred in determining that the claims were not false. Specifically, Oliver argues that: (1) the district court failed to consider certain evidence; (2) the subcontract between Parsons ES and I&M was unlawful; and (3) Parsons' accounting practices did not comply with the federal requirements.

1.

Oliver's first argument is that the district court erred in ignoring the opinion of her expert, Peter Elliot, CPA. However, in making this argument, Oliver does nothing more than reiterate Elliot's testimony, which offers an opinion regarding the legality of Parsons' accounting practices. Because Parsons' accounting practices are undisputed and the only question is whether the practices are legal, the district court was not required to accept Elliot's opinion. *See Colacurcio v. City of Kent*, 163 F.3d 545, 549 (9th Cir. 1998) ("When a mixed question of fact and law involves undisputed underlying facts, summary judgment may be appropriate.")

Appendix A

2.

Oliver next argues that the claims are false because the contractual relationship between Parsons ES and I&M was not valid. Under California law, the essential elements for a contract are (1) "[p]arties capable of contracting;" (2) "[t]heir consent;" (3) "[a] lawful object;" and (4) "[s]ufficient cause or consideration." Cal. Civ. Code § 1550 (West 1999); *Marshall & Co. v. Weisel*, 51 Cal. Rptr. 183, 187 (Ct. App. 1966).

Oliver provides three alternative theories challenging the subcontract. The first theory is that a valid subcontract never existed. However, Oliver makes no actual argument on appeal challenging the existence of the subcontract per se.[1] In fact, Oliver stipulated to the existence of the written subcontract document. That document meets all the elements required in § 1550.

The second and third theories are that the subcontract became invalid upon the expiration of the written contract on December 31, 1991, or, alternatively, that the contract became invalid when ES reincorporated as Parsons ES on October 1, 1994 — after the written contract had expired. Under California contract law, a contract may be implied from the conduct of the parties. Cal. Civ. Code § 1621 (West 1999); *British Motor Car Distrib., Ltd. v. New Motor Vehicle*

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1. Federal Rule of Appellate Procedure 28 requires the Appellant to do more than simply make assertions. She must provide an argument that contains "appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies." Fed. R. App. P. 28(a)(9)(A).

Bd., 239 Cal. Rptr. 280, 285-86 (Ct. App. 1987). It is undisputed from the record that Parsons ES and I&M continued to perform under the terms of the agreement. Therefore, the district court correctly held that a valid subcontract existed because the parties' continued performance under the terms of the written contract was sufficient to prove the continued existence of the contract. Oliver's attempts to prove falsity by challenging the subcontract between Parsons ES and I&M are unavailing.

3.

Oliver's final argument alleging falsity involves the issue of whether Parsons ES's accounting practices complied with the federal Cost Accounting Standards. The district court held in its Order of July 31, 1997, that the "falsity" element under the Act was not met because Parsons demonstrated that it made a reasonable interpretation of an ambiguous accounting standard, citing *Hagood v. Sonoma County Water Agency*, 81 F.3d 1465 (9th Cir. 1996). It concluded that the issue was "not what motive defendants had for employing [their] accounting system . . . but rather whether that accounting system reasonably complied with applicable rules and regulations."

The district court erred. *Hagood* does not stand for the proposition that a "reasonable interpretation" of a regulation precludes falsity. *Hagood* involved the question of whether the defendant's submission of allocation costs under the Water Supply Act gave rise to a false claim under the False Claims Act. *Id.* at 1476-77. In *Hagood*, the statute itself granted discretion in deciding the cost allocation that the

plaintiff claimed was false. *See id.* at 1477 ("all authorized purposes served by the project shall share equitably in the benefits of multiple purpose construction, as determined by the Secretary of the Army or the Secretary of the Interior" (emphasis added)). Unlike *Hagood*, this case involves regulations that, while unquestionably technical and complex, are not discretionary. Their meaning is ultimately the subject of judicial interpretation, and it is Parsons' compliance with these regulations, as interpreted by this court, that determines whether its accounting practices resulted in the submission of a "false claim" under the Act.[2] *See United States v. Mead*, 426 F.2d 118, 122 (9th Cir. 1970), (concluding, after engaging in judicial construction, that the defendant's interpretation of the relevant regulations was erroneous); *see also United States ex. rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512, 1524 (9th Cir. 1995), *rev'd on other grounds*, 520 U.S. 939 (1997) ("[U]nallowable costs can trigger the False Claims Act").[3]

Thus, while the reasonableness of Parsons' interpretation of the applicable accounting standards may be relevant to

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2. We note that the agency to which the allegedly false claim was submitted has not taken any position regarding any of the issues in this case, and thus no question of *Chevron* deference is presented.

3. The amicus brief submitted by the Government correctly points out the potential problem created by embracing a "reasonable interpretation" exception to the "falsity" of a claim. A defendant could submit a claim, knowing it is false or at least with reckless disregard as to falsity, thus meeting the intent element, but nevertheless avoid liability by successfully arguing that its claim reflected a "reasonable interpretation" of the requirements.

whether it knowingly submitted a false claim, the question of "falsity" itself is determined by whether Parsons' representations were accurate in light of applicable law. Because the district court erroneously relied on this reasonableness analysis, we do not reach the issue of whether Parsons' accounting measures complied with the Cost Accounting Standards and instead remand for further proceedings on this issue.

4.

In a petition for rehearing, Parsons argues that our decision breaks from previous authority in this circuit on the issue of whether a reasonable interpretation precludes falsity, citing *United States ex rel. Lindenthal v. General Dynamics Corp.*, 61 F.3d 1402 (9th Cir. 1995) and *United States ex rel. Hochman v. Nackman*, 145 F.3d 1069 (9th Cir. 1998). These cases are inapposite. *Lindenthal* did not involve the interpretation of a federal regulation but instead involved the interpretation of a contract between General Dynamics and the federal government. *Id.* at 1411. Because a term of the contract was held to be ambiguous, the court held that the parties' intent was relevant extrinsic evidence, and the court then used that evidence to inform the court's interpretation of the contract. "We agree that extrinsic evidence was properly admitted to flesh out the meaning [the contract]. 'Where contractual language is unclear and suggests several speculative interpretations, the scope of the language must be read in accordance with the parties' contemporaneous construction, and extrinsic evidence is admissible to show what the parties intended it to mean.' " *Id.* at 1411, (quoting *Lockheed Aircraft Corp. v. United*

States, 553 F.2d 69, 89 (Ct. Cl. 1977)). This holding is applicable only in the realm of contract law, where a contract represents a "meeting of the minds" between the parties and where the parties' interpretation and performance of the contract may be relevant evidence of the contract itself.

Hochman is similarly unhelpful. 145 F.3d 1069. Parsons argues that *Hochman* stands for the proposition that a reasonable interpretation of an "imprecise" directive precludes falsity. *Hochman* involved allegations that a Veterans Administration clinic submitted false claims regarding the number of hours worked by physicians at the Clinic pursuant to an agreement between the clinic and the University of Southern California School of Medicine. Contrary to Parsons' suggestion, the court did not hold that the Clinic's submission was not "false." To the contrary, the court explicitly declined to decide the question of falsity, and instead disposed of the case on the scienter element, holding that "[e]ven if the defendants erred in their interpretation of the Affiliation Agreement, the undisputed evidence demonstrates that the defendants believed that the Affiliation Agreement authorized their conduct." *Id.* at 1075.

Parsons also argues in its petition for rehearing that our holding splits from the Fifth and Seventh Circuits, asserting that those courts have adopted a "reasonable interpretation" approach to falsity. However, the cases cited do not support a conclusion that other courts have taken this view of "falsity." *United States ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013, 1018 (7th Cir. 1999) did not reach the issue and instead combined the issues of falsity and scienter, "our consideration of the falsity question will be incorporated into

our knowledge discussion." *United States ex rel. Weinberger v. Equifax, Inc.*, 557 F.2d 546 (5th Cir. 1977) also did not address the question of reasonable interpretation and instead looked to legislative history in order to determine the appropriate statutory interpretation. Finally, in *Luckey v. Baxter Healthcare Corp.*, 2 F. Supp. 2d 1034, 1047 (N.D. Ill. 1998), aff'd, 1999 WL 482670 (7th Cir. July 12, 1999), the court held that the exercise of legitimate scientific judgment did not allow a finding of falsity. "Courts have consistently declined to find that a contractor's exercise of scientific or professional judgment as to an applicable standard of care falls within the scope of the FCA." *Id.*

In short, Parsons' petition arguing that the sky will fall upon government contractors if they are precluded from relying on a "reasonable interpretation" is not only unsupported by case law, it is also ungrounded in reality. It ignores the fact that the FCA requires more than just a false statement — it requires that the defendant *knew* the claim was false. 31 U.S.C. § 3729(a)(1). A contractor relying on a good faith interpretation of a regulation is not subject to liability, not because his or her interpretation was correct or "reasonable" but because the good faith nature of his or her action forecloses the possibility that the scienter requirement is met.

B

Knowing Submission of a False Claim

The third element of a cause of action under the Act requires that the defendant knew the claim was false or

fraudulent. 31 U.S.C. § 3729(a)(1) (West 1999). Knowledge is established by proving that the defendant (1) had actual knowledge that it submitted a false or fraudulent claim for payment or approval, (2) acted in deliberate ignorance of the truth or falsity of its claim, or (3) acted in reckless disregard of the truth or falsity of its false claim. 31 U.S.C. § 3729(b) (West 1999); *Wang v. FMC Corp.*, 975 F.2d 1412, 1420 (9th Cir. 1992). "[I]nnocent mistakes" and "negligence" are not offenses under the Act. *Id.*

We conclude that there are issues of fact that survive the standard of summary judgment. Specifically, Parsons' failure to disclose the existence of I&M in its disclosure statement, coupled with the Oliver affidavit, are enough, viewed in the light most favorable to Oliver, to preclude summary judgment. Evidence in the record demonstrates that Parsons ES failed to list I&M among the companies with whom it engaged in inter-organizational transfers. The language of the relevant disclosure statement, section 2.8.0 states:

> *Inter-organizational Transfers.*
>
> This item is directed only to those materials, supplies, and services which are, or will be transferred to you from divisions, subsidiaries, or affiliates under common control with you.
>
> ([I]ndicate the basis used by you as transferee to charge the cost or materials, supplies, and services to Government contracts of similar cost objectives.)

In response, Parsons ES submitted a list of companies it stated "included" but was not "limited to" the companies with which it had inter-organizational transfers. Parsons ES did not list I&M among these companies, despite the fact that it was required to provide a "complete and accurate" disclosure under the regulations. *See* 48 C.F.R. § 9903.202-10 (1999).

Furthermore, Oliver's affidavit states that, while in her position as a government accounting specialist for Parsons ES, she immediately contacted the appropriate officers upon discovering the existence of I&M. They told her to "forget about it." The affidavit continues:

> I replied that Parsons better hope the DCAA doesn't discover I&M. The reason why I said that was because I knew that the Defense Contract Audit Agency was upset what the DCAA Auditors discovered during a floorcheck in 1992 that Parsons ES was providing services (Accounting, Human Resources, etc.) to intercompanies .... Because of that discovery, DCAA asked Parsons ES to produce a list of all Parsons interorganizational companies for which Parsons ES performed services. Parsons ES provided this list .... However, I&M was excluded from this list even though I&M has been transferring labor and other fringe benefits intercompany to ES and Parsons ES since 1989.

Oliver's affidavit further states that she was informed that the I&M company was set up so that Parsons ES would not

have to include its direct labor in the labor base for computation of the overhead rate billed to the federal government. This evidence is enough to create a genuine issue of material fact precluding summary judgment on the issue of scienter.

IV

ATTORNEYS' FEES

Because Oliver has yet to ultimately prevail in her qui tam action, we do not reach the issue of granting attorneys' fees, expenses and costs under 31 U.S.C. § 3730(d)(1) (West 1999).

REVERSED and REMANDED.

APPENDIX B — ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA DATED AND FILED JULY 31, 1997

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV 95-5423-WMB

UNITED STATES OF AMERICA EX REL.
JANET C. OLIVER,

Plaintiff,

v.

THE PARSONS COMPANY, et al.

Defendants.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Janet Oliver ("plaintiff"), an accountant employed by The Parsons Corporation ("TPC"), filed this False Claims Act action against it and a number of its subsidiaries (collectively, the "defendants") on August 14, 1995. She

alleges that defendants have created a sham corporation to which they have allocated costs that have enabled them to overcharge the federal government for contracting work done from 1989 to the present. The two subsidiaries of TPC whose activities form the basis for the allegations made by plaintiff are Engineering Science, Inc. ("ES"), which later became Parsons Engineering Science, Inc. ("Parsons ES") (collectively, "ES/Parsons ES"), and Inspection & Maintenance Corp. ("I&M").

On August 4, 1989, ES entered into a contract with the state of California's Department of Consumer Affairs for the California Bureau of Automotive Repair (the "BAR contract"). The contract provided that Parsons ES would design and operate a number of official automobile emissions testing facilities. The contract was worth $27,289,000 and was to extend through December 31, 1992. The contract price was later increased to $58,115,836 and extended through December 31, 1997. After the award of this contract ES awarded a subcontract to I&M, a company properly incorporated in the state of California, capitalized at $1,000, and wholly owned by TPC.

The $11,639,000 subcontract obligated I&M to provide most of the technical labor support associated with operating the testing facilities through December 31, 1991. The parties agree that I&M continues to provide labor to the emissions testing facilities on the terms of the subcontract, despite the fact that the subcontract was not formally extended or replaced after it expired in 1991. The provision of labor under the subcontract has been I&M's only activity. Accordingly, I&M performs no work for the federal government.

ES/Parsons ES, however, performs a significant amount of work for the federal government, amounting to over $300 million in sales between 1989 and 1996.

Plaintiff alleges that I&M was used as an accounting trick to enable ES/Parsons ES to charge a higher overhead rate to the federal government. The ES/Parsons ES overhead rate was and is calculated as the percentage difference between its direct labor base costs and its overhead pool costs. Accordingly, if ES/Parsons ES's direct labor base cost was $100, and the overhead pool money amounted to $150, then ES/Parsons ES's overhead rate charged to the government would be 150%. If its direct labor base cost was increased to $150, then the overhead rate charged to the government would be 100%. ES/Parsons ES therefore had an incentive to reduce its direct labor base costs relative to the money in the overhead pool, because doing so would increase the overhead rate charged to the federal government.

I&M was used for the allocation of the labor costs of the technicians used to operate the emissions testing stations provided by ES/Parsons ES under the BAR contract. Those labor costs were not included in the direct labor base of ES/Parsons ES. ES/Parsons ES does not separate the labor charged to its federal government contracts from the labor charged to its other contracts. Accordingly, any labor performed by ES/Parsons ES employees under any contract, be it for the federal government, the state of California, or any private entity, affects the direct labor base and overhead rate charged to the federal government. The result of allocating BAR contract labor costs to I&M, according to plaintiff, was that "the direct labor base of Defendant Parsons

ES would not be increased and thereby the Defendant Parsons ES overhead rate decreased for" other contracts with the United States. (Complaint, p.4, lines 24-28.)

I&M is essentially comprised of nothing other than its employees. Its income statements indicate that it has never incurred any overhead expenses. The parties have stipulated that I&M is, in essence, only a payroll, and the ES/Parsons ES, TPC, and another TPC subsidiary provide any administration and support services required by I&M employees. I&M pays taxes, though those taxes are prepared by another TPC subsidiary.

Plaintiff, an accountant employed by defendants filed this *qui tam* suit under seal on August 14, 1995, notified the United States of her claim, and disclosed to the government her evidence of fraud. On November 1, 1996, the government issued a letter declining to intervene in the litigation. On November 7, 1996, the complaint was unsealed and plaintiff pursued the action as relator.

The parties filed a lengthy joint statement of stipulated facts on April 28, 1997. Both sides agreed in their papers and at oral argument that the case could and should be resolved on cross-motions for summary judgment.

II. STANDARD OF REVIEW

Rule 56(c) of the Federal Rules of Civil Procedure provides that a court shall grant a motion for summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Facts are deemed "material" if a dispute over them "might affect the outcome of the suit under the governing law. . . ." *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2510 (1986). A factual dispute is "genuine" where "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

The moving party has the burden of demonstrating the absence of a genuine issue of fact for trial. *Id.* at 2514. If the moving party satisfies this burden, Rule 56(e) provides:

> When a motion for summary judgment is made and supported as provided for in this rule, an adverse party may not rest upon the mere allegations or denial of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Fed. R. Civ. P. 56(e).

III. DISCUSSION

To create liability under the False Claims Act, three factors must be met: first, the defendant must present, or cause another person to present, a "claim" for payment or

approval to the United States; second, the claim must be "false or fraudulent;" and third, the defendant must act with knowledge that the claim is false. *See, e.g. Blusal Meats, Inc. v. United States*, 638 F.Supp. 824, 827 (S.D.N.Y. 1986), *affirmed*, 817 F.2d 1007 (2nd Cir. 1987); *U.S. ex rel. Stinson v. Provident Life & Accident Ins. Co.*, 721 F.Supp. 1247, 1258-59 (S.D. Fla. 1989); John T. Boese, *Civil False Claims and Qui Tam Actions* 2-7 (1997).

A. Claim

The parties have stipulated that defendants have made a claim for payment to the United States. They agree that ES/Parsons ES "does not have a separate overhead pool for allocation only to United States Government contracts." (Joint Stip. Facts ¶ 46.) Furthermore, "[t]he Parsons ES direct labor base must include the commercial contract labor of Parsons ES." (Joint Stip. Facts ¶ 47.) Accordingly, the parties agree that the labor costs borne by I&M would have affected the overhead allocated to the federal government in ES/Parsons ES's government contracts. Government expenditures comprised 10-40% of ES/Parsons ES's annual revenues from 1989 to 1996. Defendants admitted in oral argument that their allocation of BAR contract labor costs to I&M enabled ES/Parsons ES to receive more money from the federal government than it would have if all labor costs under the BAR contract had been attributed to ES/Parsons ES.

B. False or Fraudulent

Plaintiff makes three contentions in the alternative as to the falsity of the claim made by defendants on the

government: first, that the subcontract between ES and I&M was unlawful; second, that after that subcontract expired, the continued allocation of labor costs to I&M under the BAR contract was unlawful; third, that ES was reincorporated as Parsons ES on October 1, 1994 and that the continued allocation of labor costs to I&M under the BAR after ES changed its name and after the contract with ES had expired was unlawful.

Plaintiff argues that the arrangement between I&M and ES/Parsons ES was illegal as a matter of contract law and as a matter of accounting principle.

Plaintiff's contract law contentions are meritless. The essential elements for a contract in California are: parties capable of contracting, consent, a lawful objective, and consideration. *Cal. Civ. Code* § 1550. To the extent that plaintiff contends that I&M was a sham corporation incapable of entering into a contract, her claim must fail. I&M is duly incorporated, pays taxes, and has employees. The fact that I&M and ES/Parsons ES are subsidiaries of the same corporation does not prevent them from contracting with one another. *Royal Indus. v. St. Regis Paper Co.*, 420 F.2d 449, 453 (9th Cir. 1969); *Luis v. Orcutt Town Water Co.*, 22 Cal.Rptr. 369, 372 (1952).[1] The original subcontract was

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1. Plaintiff appears to contends that I&M's corporate veil should be pierced, because, given the important role that ES/Parsons ES employees played in its management, there was a unity of ownership and interest between ES/Parsons ES and I&M under the standard set forth in *United States v. Standard Beauty Supply Stores, Inc.*, 561 F.2d 774, 777 (9th Cir. 1977). Assuming arguendo that

(Cont'd)

signed and featured consideration, under which I&M's technical labor was to be reimbursed by ES at costs incurred times a multiplier of 1.9. The subcontract satisfied the essential contract elements set forth in § 1550.

The parties differ as to whether the subcontract was extended beyond December 31, 1992. Defendants contend that the subcontract was amended orally and through written memoranda. But even if it was not, the uncontested fact that parties continued to perform under the terms of the subcontract after it expired supports the conclusion that a valid contract continued to exist. *Witkin on Contracts* § 1.19; *British Motor Car Distributors, Ltd. v. New Motor Vehicle Board*, 239 Cal.Rptr. 280, 285-86 (App. 1987) (where "the parties by their conduct manifest[ ] an agreement to continue the [contract] beyond" its expiration date, a contract continues to exist). I&M and ES/Parsons ES made a valid subcontract.

The question whether the I&M subcontract violated accounting principles applicable to government contractors is more complicated, but ultimately must be resolved in favor of defendants. Defendants need only show that they made a reasonable interpretation of an ambiguous accounting

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(Cont'd)

I&M's veil should be pierced, however, I&M would disappear into its parent corporation, which is TPC, not ES/Parsons ES. Plaintiff does not contend, and there is little doubt that TPC and ES/Parsons ES exist as separate entities, though one is the subsidiary of the other. *See Lee Mesler v. Bragg Management Co.*, 39 Cal.3d 290, 300 (1995) (for alter ego liability to apply, the corporations must not exist as separate entities).

standard to establish that they made no false claim to the government. *See U.S. ex rel. Hagood v. Sonoma County Water Agency*, 81 F.3d 1465 (9th Cir. 1996); *see also U.S. ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1421 (9th Cir. 1991) ("[t]o take advantage of a disputed legal question, as may have happened here," does not create liability). The question, then, is not what motive defendants had for employing the accounting system they used to allocate labor costs under the BAR contract, but rather whether that accounting system reasonably complied with applicable rules and regulations.

"A contractor's compliance with the Cost Accounting Standards is relevant to the determination of whether the costs it claims to have incurred are allowable." *US. ex rel. Schumer v. Hughes Aircraft*, 63 F.3d 1512, 1524 (9th Cir. 1995) *rev'd on other grounds*, 1997 WL 321246 (S.Ct. June 16, 1997); 48 C.F.R. § 31.301-2(a)(3). The parties agree that I&M was a "segment" with a "single cost objective" for the purposes of the contract accounting structure imposed by the Cost Accounting Standards Board ("CAS"). As such, I&M complied with the applicable accounting standards as set forth by the government.

The Cost Accounting Standards define a segment as a division "of an organization reporting directly to a home office, usually identified with responsibility for profit and/or providing a product or service." FAR 9904.403-30(4). I&M has both responsibility for profit reporting and provides the technical labor required for performance of the BAR contract. It reports directly to TPC, its corporate parent, and

its "home office."[2] Under the FAR, defendants were entitled to treat I&M as a segment.

Furthermore, I&M has a single cost objective: to provide labor services on the BAR subcontract. The Armed Services Contract Board of Appeals has held that when a segment has a single cost objective, it is improper to reallocate its costs to other segments. *QuesTech, Inc.*, ASCBA No. 45127, June 7, 1995 (Def. Exh. U.). Accordingly, under the reasoning of *QuesTech*, TPC was *required* to allocate the labor costs incurred by I&M to it, and not to ES/Parsons ES.

ES/Parsons ES, as another wholly owned subsidiary of TPC, was another segment for purposes of CAS accounting. The CAS mandates use of a subcontract to allocate costs between segments. "[A]n order issued by one segment to another segment shall be treated as a subcontract." FAR 9903.201-1(b)(2). The I&M subcontract reasonably complied with these apparently applicable guidelines.[3]

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2. As such, I&M receives an allocation of home office expense from TPC, which is disclosed to the Defense Contract Audit Agency (DCAA) in TPC's expense claims audited by that agency. The DCAA official responsible for ES/Parsons ES's government contracts testified that he knew at least by 1994 of I&M's existence as a TPC subsidiary based on TPC's 1990 filing.

3. Parsons ES's 1994 CAS Disclosure Statement also provides that intercompany subcontract costs will be billed, as was the case here, "to other direct cost accounts." (Def. Exh. E. at 266.) A defendant's "cost accounting practices cannot be the basis for a False Claims Act violation unless the manner in which [the defendant] accounted for its costs was inconsistent with its disclosure

(Cont'd)

Appendix B

To the extent that plaintiff makes other allegations of accounting irregularities, her claims are premised on the gravamen of her case: that I&M is a sham corporation that cannot be justified under the FAR or under Parson ES's CAS Disclosure Statement. However, as demonstrated above, plaintiff's central contention is meritless.

C. Knowledge of Falsity

"[A] violation of the False Claims Act requires scienter." *Hagood v. Sonoma County Water Agency (Hagood II)*, 81 F.3d 1465, 1477 (9th Cir. 1996). Therefore, "[f]or a *qui tam* action to survive summary judgment, the relator must produce sufficient evidence to support an inference of knowing fraud." *U.S. ex rel. Anderson v. Northern Telecom*, 52 F.3d 810, 815 (9th Cir. 1995). To establish the scienter required under the Act, a relator must show:

> that a person, with respect to information —
>
> > 1) has actual knowledge of the information;

(Cont'd)
to the government set forth in its CAS Disclosure Statement." *United States ex rel Haycock v. Hughes Aircraft*, No. CV 90-1977-KN (C.D. Cal. Mar. 8, 1994). In this case, I&M was provided for consistently with Parsons ES's CAS Disclosure Statement. Again, to make a reasonable interpretation of an ambiguous accounting standard, even if it advantaged the defendant, precludes liability under the False Claims Act. *See Hagood II*, 81 F.3d at 1469; *Hagood I*, 929 F.2d at 1421.

> 2) acts in deliberate ignorance of the truth or falsity of the information; or
>
> 3) act in reckless disregard of the truth or falsity of the information,
>
> and no proof of specific intent to defraud is required.

31 U.S.C. § 3729(b); *Hagood II*, 81 F.3d at 1478. "The requisite intent is the knowing presentation of what is known to be false, as opposed to innocent mistake or mere negligence." *Id.* Accordingly, "the statutory phrases 'known to be false' does not mean scientifically untrue; it means a lie." *Anderson*, 52 F.3d at 816 (quotation marks, citations omitted).

Plaintiff propounds two pieces of evidence in her effort to establish scienter by defendants. First, she observes that I&M was not identified in the "Interorganizational Transfers" section of the Parsons ES CAS Disclosure Statement submitted to the government on December 31, 1994. However, this omission cannot be considered material or a lie because a listing of all subcontractors or related entities is not required by the statement instructions. Instead, the Board only requires Parsons ES to "indicate the basis used by you to charge the cost or price of interorganizational transfers or materials, supplies, and services to Government contracts or similar cost objectives." (Def. Exh. E at 235.) Parsons ES responded to the instruction by listing a number of TPC subsidiaries and indicating that those entities would receive "inter-company work authorizations for their

services, materials, and supplies." *Id.* at 266. Though I&M was not among the subsidiaries listed, Parsons ES indicated that interorganizational transfers would not necessarily be limited to those on the list. *Id.* (subsidiaries "which include but not [sic] limited to" those listed would receive inter-company work authorizations). Indeed, nine unlisted TPC subsidiaries entered into subcontracts with Parsons ES, including I&M. The omission of I&M from the list was not unique or required and accordingly does not support an inference of scienter.

Furthermore, I&M's parent, TPC, did inform the Defense Contract Audit Agency (DCAA) of I&M's existence and the home office allocations made to it on an annual basis. *See* p. 8, n. 2, *supra*. This disclosure shows that defendants did not attempt to conceal I&M's existence from the government. Even if the nondisclosure in the Parsons ES Disclosure Statement, though not required, somehow constituted a material omission, some other disclosure of I&M to the DCAA would "as a matter of law" cure such a nondisclosure. *U.S. v. Hughes Aircraft Company*, 1991 WL 133566 (C.D. Cal. 1991). This Court has held that "[w]hen nondisclosure is at issue, knowledge or disclosure necessarily negates the viability of the claim." *Id.* The failure to disclose I&M's existence in the 1994 CAS Disclosure Statement cannot support a finding of scienter because disclosure was neither required nor withheld. The "omission" in the Statement cannot be construed to support a finding of guilty knowledge.

Plaintiff's second piece of evidence proffered in support of a finding of scienter is her claim that, upon inquiring to her supervisor whether I&M should be listed in the Parsons

ES CAS Disclosure Statement as a listed company, she was told to "forget about it." The comment does not establish fraud, given that Parsons ES was not required to disclose I&M in its CAS Disclosure Statement. Indeed, the comment is susceptible to any number of innocent interpretations. Even if interpreted as evidence of a coverup, the comment alone would not create a question of fact sufficient to defeat entry of summary judgment. "Many False Claims Act cases are prone to resolution on dispositive motions even when opposing parties dispute[ ] material facts." John T. Boese, *Civil False Claims and Qui Tam Actions* 5-70 (1997). In *Wang v. FMC Corp.*, 975 F.2d 1412, 1420 (9th Cir. 1992), the Ninth Circuit affirmed a summary judgment despite a sworn affidavit by the relator who was also the chief engineer of a project that claims based on the project were false. *See also U.S. v. Data Translation, Inc.*, 984 F.2d 1256 (1st Cir. 1992) (affirming directed verdict granted over sworn testimony that a claim was false).[4]

IV. CONCLUSION

Plaintiff's motion for summary judgment is DENIED. Defendants' motion for summary judgment is GRANTED.

Date: July 31, 1997

s/ Wm. Matthew Byrne, Jr.
Wm. Matthew Byrne, Jr.
United States District Judge

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4. Because plaintiff has proffered insufficient facts to support her allegation of scienter, the fact that defendants have admitted that $21,091 in human resources and comptroller costs allocated to ES/Parsons ES should have been allocated to I&M does not create liability under the False Claims Act.

Appendix B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV 95-5423-WMB

UNITED STATES OF AMERICA EX REL.
JANET C. OLIVER,

Plaintiff,

v.

THE PARSONS COMPANY, et al.

Defendants.

JUDGMENT

The Court having issued its Order in the above entitled action, IT IS HEREBY ORDERED that judgment is granted for The Parsons Company, Parsons Engineering Science, Inc., Parsons Environmental Services Inc., and the Ralph M. Parsons Company on all of the claims in this action.

Each side to bear its own costs.

DATED: July 31, 1997

s/ Wm. Matthew Byrne, Jr.
Wm. Matthew Byrne, Jr.
United States District Judge

APPENDIX C — RELEVANT STATUTES

31 U.S.C. § 3729

§ 3729. False claims

(a) Liability for certain acts. — Any person who —

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without

completely knowing that the information on the receipt is true;

(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person, except that if the court finds that —

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

> **(C)** at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation;

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person. A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) Knowing and knowingly defined. — For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information —

> **(1)** has actual knowledge of the information;
>
> **(2)** acts in deliberate ignorance of the truth or falsity of the information; or
>
> **(3)** acts in reckless disregard of the truth or falsity of the information,

and no proof of specific intent to defraud is required.

(c) Claim defined. — For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States

Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

(d) Exemption from disclosure. — Any information furnished pursuant to subparagraphs (A) through (C) of subsection (a) shall be exempt from disclosure under section 552 of title 5.

(e) Exclusion. — This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

* * *

31 U.S.C. § 3730

§ 3730. Civil actions for false claims

(a) Responsibilities of the attorney general. — The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) Actions by private persons. — (1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action

may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure.[1] The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall —

> **(A)** proceed with the action, in which case the action shall be conducted by the Government; or

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1. See, now, Rule 4(i) of the Federal Rules of Civil Procedure.

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) Rights of the parties to Qui Tam actions. — (1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2)(A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or

unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as —

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person's cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit

the Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

Appendix C

(d) Award to Qui Tam plaintiff. — (1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and

shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

Appendix C

(e) Certain actions barred. — (1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2)(A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C.App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

(f) Government not liable for certain expenses. — The Government is not liable for expenses which a person incurs in bringing an action under this section.

(g) Fees and expenses to prevailing defendant. — In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

(h) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

* * * *

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(2)

No. 99-1225

IN THE

Supreme Court of the United States

PARSONS CORPORATION; PARSONS ENGINEERING SCIENCE, INC.; PARSONS ENVIRONMENTAL SERVICES, INC.; AND THE RALPH M. PARSONS COMPANY,

Petitioners,

v.

UNITED STATES OF AMERICA *ex rel.* JANET C. OLIVER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED BY PETITIONERS

i. Whether the *qui tam* provisions of the False Claims Act, 31 U.S.C. § 3729, unconstitutionally extends federal court jurisdiction beyond Article III limits by permitting an action by a plaintiff who has not suffered a "particularized" injury and who therefore lacks standing under Article III, Section 2.

ii. Whether allowing a *qui tam* plaintiff standing to assert an injury to the United States is contrary to this Court's holding that only "officers of the United States" appointed pursuant to Article II, Section 2 may conduct civil litigation on behalf of the United States.

iii. Whether allowing a *qui tam* plaintiff standing to assert an injury to the United States violates constitutional separation of powers because it limits the President's ability to control the prosecutorial powers wielded by a *qui tam* plaintiff and thereby conflicts with the President's duty to "take care that the Laws be faithfully executed."

iv. Whether a person can be liable for presenting a false claim under the False Claims Act, 31 U.S.C. § 3729, when that claim is based upon an admittedly reasonable interpretation of an ambiguous regulation or statute.

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NOW COMES RESPONDENT and respectfully files a Response to the Petition for Writ of Certiorari made by Petitioners Parsons Corporation, *et al.* as ordered on April 7, 2000.

REASONS FOR DENYING THE WRIT

I.

THE CONSTITUTIONAL ARTICLE III STANDING QUESTIONS SHOULD NOT BE ENTERTAINED.

The Petitioners have presented three constitutional standing questions. (Questions i, ii and iii, Page i of the Petition). All three of the questions were not raised nor briefed nor argued in the United States District Court nor in the United States Court of Appeals for the Ninth Circuit but have already been briefed and argued before this Honorable Court in *State of Vermont Agency of Natural Resources v. United States of America ex rel. Jonathan Stevens*, USSC Docket Number 98-1828, and the related action, *Joyce Riley v. St. Luke's Episcopal Hospital*, USCA Docket Number 97-20948 (5th Cir.).

In response to the Petition for Writ of Certiorari, the Respondent references and incorporates the Supplemental Brief for the United States by the Solicitor General and the Supplemental Brief concerning Article III Standing by Taxpayers Against Fraud in the *Stevens* case and the Supplemental En Banc Brief for the Intervenor/Appellant United States in the *Riley* case.

Perhaps too simplistically, Respondent respectfully submits that this Honorable Court has already addressed the

issue in *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 943 (1997), wherein a new cause of action for the Coplaintiff Relator was held to have been created by the United States Congress in the 1986 Amendment to the False Claims Act, 31 U.S.C. § 3729 *et seq.*, to wit:

> In permitting actions by an expanded universe of plaintiffs with different incentives, the 1986 amendment essentially creates a new cause of action, not just an increased likelihood that an existing cause of action will be pursued.

In *Schumer*, the Department of Justice did not intervene, yet this Honorable Court took that opportunity to confirm a new cause of action for the Coplaintiff Relator under the False Claims Act by the United States Congress. If this Honorable Court should desire to revisit that creation of a new cause of action under the False Claims Act, then the issue simply should be whether the United States Congress has had the constitutional authority to enact the False Claims Act since the Civil War.

More than $3 billion have been recovered under the False Claims Act since the 1986 Amendment thereto, complemented by the deterrent effect upon the recipients of federal funds. Most recently, on April 13, 2000, Congress passed H. CON. RES. 290, its budget resolution for Fiscal Year 2001. The resolution included a Sense of the Senate provision:

SEC. 317. USE OF FALSE CLAIMS ACT IN COMBATTING MEDICARE FRAUD.

(a) FINDINGS — The Senate finds that —

(1) the solvency of the medicare trust funds is of vital importance to the well-being of the Nation's seniors and other vulnerable people in need of quality health care;

(2) fraud against the medicare trust funds is a major problem resulting in the depletion of the trust funds; and

(3) chapter 37 of title 31, United States Code (commonly referred to as the False Claims Act) and the *qui tam* provisions of that chapter are vital tools in combatting fraud against the medicare program.

(b) SENSE OF THE SENATE — It is the sense of the Senate that the levels in this resolution assume that chapter 37 of title 31, United States Code (commonly referred to as the False Claims Act) and the *qui tam* provisions of that chapter are essential tools in combatting medicare fraud and should not be weakened in any way.

The Sense of the Senate provision had bipartisan sponsorship from Sen. Charles Grassley (R-IA) and Sen. Kent Conrad (D-ND) and was adopted by voice vote in the Senate Budget Committee. The full text of the budget

resolution may be found on the Library of Congress website, located online at http://thomas.loc.gov.

The instant Qui Tam action was filed on August 14, 1995. On November 1, 1996 the United States Government elected not to intervene in the Qui Tam action as it was entitled to do under False Claims Act, 31 U.S.C. § 3730(b)(2), nor did the United States Government move to dismiss the Qui Tam action as it likewise was entitled to do under False Claims Act, 31 U.S.C. § 3730(c)(2)(A), but on the same day the Department of Justice wrote the extraordinary letter to Counsel for Petitioners-Defendants dated November 1, 1996, to wit:

> As you know, the United States has declined to intervene at this time in the above-referenced case. However, please be advised that the declination is not intended, and should not be construed, as any indication that the United States or any of its departments or agencies, including the Department of Justice, approves of, sanctions, or acquiesces in your clients' accounting practices addressed in the relator's complaint.

It is respectfully submitted that in the event that the United States Attorney General elects not to intervene under the False Claims Act, 31 U.S.C. § 3730(b)(e) but does not move to dismiss the Qui Tam action pursuant to the False Claims Act, 31 U.S.C. § 3730(c)(2)(A), the United States Attorney General thereby grants consent and permission by the Executive Department for the Coplaintiff Relator to conduct the Qui Tam litigation, certain to confront the challenge of Rule 12 and 56 motions by the Qui Tam Defendant.

II.

THE PETITION FOR WRIT OF CERTIORARI MISSTATES THE QUESTION AND THE LAW CONCERNING THE NINTH CIRCUIT DECISION.

The Petitioners have presented one new question of law concerning the Ninth Circuit decision in the Petition for Writ of Certiorari, to wit:

> iv. Whether a person can be liable for presenting a false claim under the False Claims Act, 31 U.S.C. § 3729, when that claim is based upon an admittedly reasonable interpretation of an ambiguous regulation or statute.

The Petitioners misstate the record by the use of the adjectives *admittedly* reasonable interpretation and *ambiguous* regulation or statute. There is no admission of a reasonable interpretation. Quite to the contrary, the Ninth Circuit has ruled that there is a genuine issue of fact for trial. The United States District Court did hold that there was an ambiguous regulation or statute without identifying the provision of the regulation or statute that was supposedly ambiguous. It is respectfully submitted that this Honorable Court should not assume that the Cost Accounting Standards laws, regulations and standards *per se* are ambiguous nor that some unidentified provision of the Cost Accounting Standards laws, regulations and standards is ambiguous.

Petitioners have misstated the law of proof under the False Claims Act (Page 29 of the Petition), to wit:

> To that end, Congress has specifically required that the United States prove both objective

> reasonableness (falsity) and subjective intent to defraud (scienter) before imposing liability under the False Claims Act, including liability for treble damages, penalties, and attorneys' fees and costs.

In the 1986 Amendment to the False Claims Act, 31 U.S.C. § 3729(b), the United States Congress legislated that "no proof of specific intent to defraud is required".[1] Undaunted, the False Claims Act Defense Bar creatively argued that instead of "intent" that "scienter" had to be proved. During the argument before the Ninth Circuit, Counsel for Respondent stated that he hoped that the Ninth Circuit would explain the difference between "intent" and "scienter" as applied to the False Claims Act. The Presiding Judge, Hon. Stephen Reinhardt, in another concurrent decision, filed on July 13, 1999, *United States ex rel. Plumbers and Steamfitters Local Union No. 38 v. C.W. Roen Construction Co.*, 183 F.3d 1088, 1092-93 (9th Cir. 1999), emphasized the statutory language when describing the scienter requirement under the False Claims Act, to wit:

> We turn now to the question of scienter. The False Claims Act imposes liability only on those who "knowingly" present a "false or fraudulent claim" to the government. See 31 U.S.C. § 3729(a)(1). Mere negligence and "innocent mistake[s]" are not sufficient to establish liability under the FCA. *United States ex rel. Hochman v. Nackman*, 145 F.3d 1069, 1073 (9th Cir. 1998). While some of our cases may contain extraneous

---

1. The decisions cited prior to the 1986 Amendment to the False Claims Act on the issue of proof of intent are irrelevant to the post 1986 False Claims Act standards of proof, 31 U.S.C. § 3729(b).

comments that might be read out of context to suggest that the FCA requires an intentional lie to trigger liability, those cases almost invariably reiterate the controlling statutory language that is determinative of their outcome. As the FCA provides, to rise to the level of "knowing" presentation, all that is required is that the party:

> (1) has actual knowledge of the information;
>
> (2) acts in deliberate ignorance of the truth or falsity of the information; or
>
> (3) acts in reckless disregard of the truth or falsity of the information,
>
> *5 and no other proof of specific intent to defraud is required.

31 U.S.C. § 3729(b). We have repeatedly emphasized this statutory language when describing the scienter requirement under the FCA. *See, e.g.*, *Hagood v. Sonoma County Water Agency*, 81 F.3d 1465, 1478 (9th Cir. 1996); *Wang v. FMC Corp.*, 975 F.2d 1412, 1420 (9th Cir. 1992); *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1421 (9th Cir. 1991). Thus, in order to be liable for an FCA violation, Roen's conduct need only qualify under one of the alternative statutory standards, such as "deliberate ignorance" or "reckless disregard".

In the instant Qui Tam Action, Counsel for Respondent introduced *de novo* and the United States District Court accepted a new "reasonable interpretation" theory of proof for defense against liability under the False Claims Act, which was rejected by the Ninth Circuit citing the Amicus Curiae Brief by the United States (Page 12a, Note 3, Appendix A of Petition), to wit:

> 3. The amicus brief submitted by the Government correctly points out the potential problem created by embracing a "reasonable interpretation" exception to the "falsity" of a claim. A defendant could submit a claim, knowing it is false or at least with reckless disregard to falsity, thus meeting the intent element, but nevertheless avoid liability by successfully arguing that its claim reflected a "reasonable interpretation" of the requirements.

A. There Is No Split With The Fifth And Seventh Circuits.

The argument by Petitioners that there is a split with the Fifth and Seventh Circuits has been rejected by the Ninth Circuit (Pages 4a, 14a and 15a, Appendix A of the Petition) which distinguished the *Lamers*, *Weinberger* and *Luckey* decisions upon which Petitioners rely, to wit:

> Parsons also argues in its petition for rehearing that our holding splits from the Fifth and Seventh Circuits, asserting that those courts have adopted a "reasonable interpretation" approach to falsity. However, the cases cited do not support a conclusion that other courts have

taken this view of "falsity." *United States ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013, 1018 (7th Cir. 1999) did not reach the issue and instead combined the issues of falsity and scienter, "our consideration of the falsity question will be incorporated into our knowledge discussion." *United States ex rel. Weinberger v. Equifax, Inc.*, 557 F.2d 456 (5th Cir. 1977) also did not address the question of reasonable interpretation and instead looked to legislative history in order to determine the appropriate statutory interpretation. Finally, in *Luckey v. Baxter Healthcare Corp.*, 2 F.Supp.2d 1034, 1047 (N.D.Ill. 1998), aff'd, 1999 WL 482670 (7th Cir. July 12, 1999), the court held that the exercise of legitimate scientific judgment did not allow a finding of falsity. "Courts have consistently declined to find that a contractor's exercise of scientific or professional judgment as to an applicable standard of care falls within the scope of the FCA." *Id.*

In short, Parsons' petition arguing that the sky will fall upon government contractors if they are precluded from relying on a "reasonable interpretation" is not only unsupported by case law, it is also ungrounded in reality.

CONCLUSION

Respondent prays that this Honorable Court denies the Petition for Writ of Certiorari

Respectfully submitted,

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v.

UNITED STATES OF AMERICA *ex rel.* JANET C. OLIVER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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I.

Respondent Janet C. Oliver argues that certiorari should be denied because this Court has already addressed all relevant constitutional issues in *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997). Respondent asserts that Congress *intended* the 1986 Amendments to the False Claims Act, 31 U.S.C. § 3729 *et seq.*, to create "a new cause of action" for relators. Opp. at 2. Respondent also asserts that the Executive has *intended* to permit or to consent to Respondent's prosecution of this action. Opp. at 4. Neither point, however, even if true, addresses the constitutional issue whether Congress may validly eliminate the Article III "particularized injury" requirement.

Petitioner Parsons acknowledges that "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973) (citing *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 212 (1972) (White, J., concurring); *Hardin v. Kentucky Utils. Co.*, 390 U.S. 1, 6 (1968)). It is axiomatic, however, that Congress may not create federal jurisdiction in a manner inconsistent with the strictures of Article III. *See e.g.*, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). And it is now well-settled that, at an "irreducible minimum," Article III requires a plaintiff to have suffered an "injury in fact" that is "particularized" to her in the sense that it "affect[s her] in a personal and individual way." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 & n.1 (1992). Here, Respondent's only asserted injury is to the United States. She alleges no claim of injury to herself. Article III requires more.

II.

The Ninth Circuit, as most of the circuits, has previously determined that *qui tam* plaintiffs have standing. *See United States ex rel. Kelly v. Boeing*, 9 F.3d 743 (9th Cir. 1993); *see also United States ex rel. Kreindler & Kreindler v. United Techs. Corp.*, 985 F.2d 1148, 1154 (2d Cir. 1993); *United States ex rel. Milam v. University of Texas M.D. Anderson Cancer Ctr.*, 961 F.2d 46, 49 (4th Cir. 1992); *United States ex rel. Weinberger v. Equifax, Inc.*, 557 F.2d 456 (5th Cir. 1977). It is settled law. Petitioner Parsons could not and did not raise the constitutional jurisdictional questions below. Issues concerning the constitutional jurisdiction of the federal courts, however, may be raised at any stage of the proceedings. *Clinton v. City of New York*, 524 U.S. 417, 428 (1998). Indeed, this Court's precedent requires federal courts to consider such jurisdictional issues even when not raised by the parties. *See Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 582 (1999) ("Article III generally requires a federal court to satisfy itself of its jurisdiction over the subject matter before it considers the merits of a case."); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101-02 (1998) ("For a court to pronounce upon [the merits] when it has no jurisdiction to do so is . . . for a court to act ultra vires.").

III.

This case comprises the optimum presentation of the constitutional issues underlying the *qui tam* provision of the False Claims Act — the constitutionality of which is even strongly in doubt at the Department of Justice. *See Constitutionality of the Qui Tam Provisions of the False Claims Act*, 13 Op. Off. Legal Counsel 207, 208 (1989) (opinion of former Attorney General William P. Barr) ("The Office of Legal Counsel, the Civil Division, and the former Office of Legal Policy all agree that the *qui tam* provisions

in the False Claims Act are unconstitutional [under Article III, the Appointments Clause, and the separation of powers doctrine].").[1] This petition squarely raises both the Article III standing presented herein and the Article II questions reserved in *Friends of the Earth, Inc. v. Laidlaw, Environmental Services (TOC), Inc.*, __ U.S. __, 120 S. Ct. 693, 713, 719-20 (2000) (concurring opinion of Kennedy, J. and dissenting opinion of Scalia, J.). It presents no issue of statutory interpretation or sovereign immunity, *compare United States ex rel. Stevens v. Vermont*, 162 F.3d 195 (2d Cir. 1998), and no complex government contract regulatory issue. The facts are not in dispute for purposes of this appeal. Finally, the relator does not allege a retaliation cause of action under 31 U.S.C. § 3730(h) or any other "injury in fact" that is particularized to her. *Compare Riley v. St. Luke's Episcopal Hosp.*, 196 F.3d 514, 541 (5th Cir. 1999) (DeMoss, J., concurring). This petition serves up a perfect candidate for consideration of the constitutional issues implicated by the *qui tam* provisions of the False Claims Act.

---

1. Speaking on behalf of the Civil Division of the Office of the Attorney General, then-Assistant Attorney General Barr went on to state:

> We believe [the *qui tam* provisions of the False Claims Act] violate the Appointments Clause, infringe on the President's core Article II authority to execute the law, and violate Article III standing doctrine. The Civil Division would like to enter an appropriate case and, either as amicus or by intervention, present the executive branch's arguments against the constitutionality of *qui tam*. The Solicitor General argues that we should intervene in district court to support the constitutionality of *qui tam*.

13 Op. Off. Legal Counsel at 208.

CONCLUSION

The petition for writ of certiorari should be granted.

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